

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF TEXAS  
TYLER DIVISION

ACQIS, LLC

)

DOCKET NO. 6:09cv148

-vs-

)

Tyler, Texas

APPRO INTERNATIONAL,  
ET AL

)

1:05 p.m.

February 22, 2011

TRANSCRIPT OF TRIAL  
AFTERNOON SESSION  
BEFORE THE HONORABLE LEONARD DAVIS,  
UNITED STATES DISTRICT JUDGE  
A P P E A R A N C E S

FOR THE PLAINTIFF:

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1 P R O C E E D I N G S

2 (Jury out.)

3 COURT SECURITY OFFICER: All rise.

4 THE COURT: Please be seated.

5 All right. Now, let's see, after this  
6 next witness, will that conclude Defendant's witnesses?

7 MR. VERHOEVEN: Yes. We will move some  
8 exhibits in right before this witness, and then this  
9 witness and that will conclude our trial presentation.

10 THE COURT: Then are there going to be  
11 any rebuttal witnesses?

12 MR. BROGAN: Yes, Your Honor.

13 THE COURT: How long do you anticipate  
14 this witness will take?

15 MR. VERHOEVEN: 50 minutes, 5-0.

16 THE COURT: 5-0. Any cross?

17 MR. BROGAN: No more than any time we  
18 have left, Your Honor.

19 THE COURT: You're getting slim. The  
20 Court Security Officer has a hook over there.

21 Okay. Well, just so you do have your  
22 times, Plaintiff has used 11 hours and 17 minutes, and  
23 Defendant has used 10 hours and 30 minutes.

24 So let me inquire whether do you  
25 anticipate saving some time for willfulness?

1 MR. BROGAN: It's very hard to say on the  
2 limited time that we have, Your Honor.

3 THE COURT: All right. Before --

4 MR. VERHOEVEN: And, Your Honor, I don't  
5 know if you're inclined to hear it, but the case has  
6 changed pretty dramatically since we moved on  
7 willfulness. You know, over the weekend before trial,  
8 we've gotten three patents instead of seven. So, you  
9 know, we really don't think there is a willfulness case.

10 THE COURT: Really?

11 MR. VERHOEVEN: I'll sit down.

12 THE COURT: Oh, okay.

13 All right. Well, before we bring the  
14 jury back in, let me just -- it sounds like we're going  
15 to be through with the evidence here in another hour or  
16 so, so we're printing out the Court's Charge.

17 I don't anticipate there will be any  
18 objections from either side to it; but just in case  
19 there are, I'll give you a chance to look at it  
20 before -- and we will take up -- we will take up  
21 objections to the Court's Charge immediately after the  
22 close of evidence, and that will be your only  
23 opportunity to object.

24 So have your legal folks -- you'll have a  
25 couple of hours here to look at it. Look over it good,

1 because I want to get in it final form this afternoon  
2 where we don't come in in the morning -- and I won't  
3 even entertain any further objections in the morning, if  
4 you sleep on it and dream up something else, okay?

5 MR. VERHOEVEN: Yes, Your Honor.

6 THE COURT: All right. Anything else  
7 before we bring the jury?

8 Okay. Bring them in.

9 COURT SECURITY OFFICER: All rise for the  
10 jury.

11 (Jury in.)

12 THE COURT: All right. Please be seated.

13 Now, I don't know who got that good lunch  
14 today, but you can't sleep this afternoon. You still  
15 have to listen to the testimony.

16 JUROR: It was good. Thank you.

17 THE COURT: My compliments as well. Our  
18 staff really enjoyed that as well. It was very nice.

19 And I think that's worked well this week,  
20 too.

21 I want to thank the lawyers from both  
22 sides for providing those lunches. I think it's really  
23 moved things along. I hope it hasn't been -- I hope  
24 y'all have been able to get some lunch during these  
25 breaks.

1 All right. Very well. You may call your  
2 next witness.

3 MS. CANDIDO: Your Honor, Defendant IBM  
4 calls Alan Ratliff.

5 And while he's approaching, we'd like to  
6 hand up Defendant's Fourth Exhibit List, which includes  
7 exhibits previously admitted and a short group at the  
8 end of stipulated exhibits to be entered today, Your  
9 Honor.

10 THE COURT: Okay. Has Plaintiff had a  
11 chance to review that?

12 MS. CANDIDO: I believe they have, Your  
13 Honor.

14 THE COURT: There are any objections to  
15 those exhibits?

16 MR. FRIEL: Assuming the ones in the book  
17 are the ones we agreed to, no objection.

18 THE COURT: Are they?

19 MS. CANDIDO: Yes, Your Honor.

20 THE COURT: All right. They will be  
21 admitted then, Defendants' Exhibit List No. 4.

22 Does Plaintiff have an exhibit list that  
23 they wish to have admitted today or clean anything up?

24 Okay. All right. Raise your right hand  
25 and be sworn.

1 MR. FRIEL: Excuse me?

2 THE COURT: Yes?

3 MR. FRIEL: Plaintiff's Exhibit 39.

4 THE COURT: You move admission of  
5 Plaintiff's Exhibit 39?

6 MR. FRIEL: Yes, Your Honor.

7 THE COURT: Any objection?

8 MS. CANDIDO: I'm sorry --

9 THE COURT: Can you tell them what that  
10 is?

11 MS. CANDIDO: Yes, please.

12 MR. FRIEL: It's a stipulated exhibit.

13 MS. CANDIDO: Then we have no objections,  
14 Your Honor, if it's one of the stipulated exhibits that  
15 we discussed.

16 THE COURT: All right. It will be  
17 admitted.

18 All right. Now you may swear the  
19 witness, please.

20 (Witness sworn.)

21 THE COURT: You may be seated.

22 Ms. Ferguson, I had you jumping up and  
23 down there. You couldn't type and swear the witness at  
24 the same time.

25 All right. You may proceed.

1 ALAN RATLIFF, DEFENDANT'S WITNESS, SWORN

2 DIRECT EXAMINATION

3 BY MS. CANDIDO:

4 Q. Good afternoon, Mr. Ratliff.

5 Would you please state your full name for the  
6 record and tell the jury where you're from?

7 A. Yes. My name is Alan Ratliff, and I'm from  
8 Houston, Texas.

9 Q. What do you do for a living?

10 A. I'm a partner in a firm called the StoneTurn  
11 Group. It's a financial, economic, and accounting  
12 consultancy with offices across the U.S. and London.  
13 And I work on those kind of projects.

14 Q. What's your area of expertise?

15 A. One of my specialties is patent licensing and  
16 patent valuation, including determining reasonable  
17 royalties in litigation like this.

18 Q. What is your educational background?

19 A. So I am a Texas CPA and Texas-licensed  
20 attorney. I've got an undergraduate degree and a  
21 graduate degree in accounting and business from Baylor  
22 University, and then I've got a law degree from Southern  
23 Methodist University in Dallas.

24 Q. Do you have any teaching experience?

25 A. I do. I taught on the Baylor Accounting

1 faculty. I also taught first-year legal research and  
2 writing at SMU Law School. In addition to that, I've  
3 served as an adjunct professor, meaning it wasn't my  
4 main job, but I enjoyed teaching. So I taught at two  
5 different Houston law schools.

6 I also taught at the University of Houston  
7 Business School, and then I have taught at various  
8 seminar programs at University of Texas, University of  
9 Virginia, University of California, Virginia Tech, other  
10 schools like that.

11 Q. You mentioned earlier that you're a CPA and a  
12 lawyer. Do you have any other professional  
13 certifications?

14 A. I do. I'm also nationally certified in  
15 financial forensics by the American Institute of  
16 Certified Public Accountants. Financial forensics is  
17 the kind of work that people who do expert witness work  
18 on damages and valuation, that's what financial  
19 forensics is.

20 Q. Mr. Ratliff, I won't make you go through every  
21 bit of your work history for the jury, but would you  
22 please describe generally your work experience that's  
23 relevant to the analysis that you're here to testify  
24 about today?

25 A. Sure. Sort of we're in time-saving mode as

1     you can tell, so I'm going to try to do these things  
2     very quickly.

3                 So the short story is, after graduate school,  
4     I worked on a large international accounting firm.  
5     That's where I first started doing financial and  
6     economic analysis.

7                 I went back to law school. I clerked for a  
8     federal judge; and during that clerkship, we handled  
9     patent and other IP kinds of cases as part of the  
10    clerkship. That's my first exposure to this kind of  
11    subject matter.

12                From there, I went to work for a larger  
13    national law firm, and I was often given the economics  
14    and accounting and finance issues in the cases and to  
15    work with experts like I am today.

16                Then from there, I decided I sort of liked  
17    this niche of working with the numbers on IP and other  
18    kinds of cases; and a little over a decade ago, I  
19    started working as a consultant, which is what I do  
20    today.

21                Q.    Have you worked in any licensing projects for  
22    a university or individual inventor?

23                A.    Yes. You've heard testimony about licensing.  
24    I've served as a licensing consultant and helped out  
25    universities, including the University of Texas,

1 University of Virginia, Caltech, Duke. I'm working on a  
2 project currently for Kansas State, among others.

3 I've also worked for individual inventors.

4 I've worked for inventors who had inventions related to  
5 cardiovascular stents. I've worked for inventors that  
6 had a little phone technology, computer server  
7 technology, and other types of contemporary high tech.

8 Q. Have you ever negotiated any real-world patent  
9 licenses?

10 A. I have. Both as a lawyer and a consultant,  
11 I've served as the negotiator. I've also served in  
12 support of a negotiator. I sort of lose count, but, you  
13 know, it's several dozen, probably close to 50 by now.

14 Q. Have you ever served in a role in a lawsuit  
15 other than as an expert witness?

16 A. I have. I've also served as an arbitrator,  
17 both on IP and non-IP kinds of disputes, and I've also  
18 served as a special master.

19 Q. Would you explain to the jury what's involved  
20 in being an arbitrator and a special master?

21 A. The short version of the story is sometimes  
22 under contracts parties agree rather than going to  
23 court, they'll handle it through some type of private  
24 proceeding. And an arbitrator serves in the role of a  
25 private judge.

1           As a special master, I was appointed by a  
2       federal judge in the District of Maryland to help sort  
3       out a billion-dollar licensing dispute that involved  
4       both U.S. and foreign countries, a total of 10 in all;  
5       reviewed literally thousands of documents; wrote a  
6       thousand-page report; submitted it in the case. And it  
7       was not objected to by the parties, and it was accepted  
8       by the court.

9           Q.     Mr. Ratliff, like all of the other experts,  
10      you're being compensated for your time in connection  
11      with this case at your hourly customary rate.

12                But does any aspect of your compensation  
13      depend on the outcome of this case?

14           A.     It does not.

15                MS. CANDIDO: Your Honor, IBM moves to  
16      qualify Mr. Ratliff as a qualified expert in patent  
17      damages.

18                THE COURT: Any objection?

19                MR. FRIEL: No objection, sir.

20                THE COURT: All right. He will be so  
21      qualified.

22           Q.     (By Ms. Candido) Mr. Ratliff, what was your  
23      assignment in this case?

24           A.     I was basically asked to do two things. I was  
25      asked to take the information in the case and my

1 experience and to determine what a reasonable royalty  
2 sufficient to compensate ACQIS would be, if you, as a  
3 jury, decide that the patents are not invalid and that  
4 IBM has infringed.

5 Q. In summary, what is your opinion regarding the  
6 appropriate royalty?

7 A. In my opinion, the appropriate royalty, if  
8 you, as a jury, determine that the patents are not  
9 invalid and that IBM infringes, to be \$3.5 million.

10 Q. Now, Mr. Ratliff, you understand that IBM  
11 believes it does not infringe ACQIS' patents, right?

12 A. That's correct. And, again, to sort of try to  
13 save time for the jury, my testimony here is sort of  
14 contingent. And you're not going to really need what I  
15 say, if you determine that the ACQIS patent is invalid  
16 or that IBM does not infringe.

17 But you're not going to make that  
18 determination until all of the evidence is closed and  
19 the Judge has given you the case. So both parties have  
20 had to put on evidence about damages just in case you  
21 get to that issue.

22 Q. So in forming your opinion, you were asked to  
23 assume that IBM infringes the ACQIS patents and that  
24 those patents are found to be valid; is that right?

25 A. That's correct. It's just an assumption.

1 Q. And if the patents are not infringed or the  
2 patents are invalid, then what?

3 A. There's no damages.

4 Q. Can you give the jury an idea of the type and  
5 amount of information you've reviewed in order to form  
6 your opinions?

7 A. You've probably gotten a sense already of the  
8 voluminous amount of information that was produced by  
9 the parties in this case. You've seen a lot of it on  
10 the screen. You've heard witnesses talk about it.

11 I considered the same core information that  
12 you heard Misters Vellturo and Murtha talk about last  
13 week on Wednesday and Thursday. So I considered things  
14 like IBM's BladeCenter sales. I considered things like  
15 the settlement license. I considered industry data.

16 You heard about a source that all the parties  
17 referenced called IDC. That industry data, I considered  
18 that. I considered the technical expert opinions.

19 But in addition to those things that Misters  
20 Vellturo and Murtha considered, I also went further than  
21 that. So beyond just BladeCenter, I considered the core  
22 components that are most related to the invention that  
23 Dr. Chu claims.

24 You've heard them referred to as a chipset and  
25 the switch or the hub controller. I considered the

1 value or the sale value of those subcomponents.

2 In addition to that, I considered IBM  
3 licenses. I considered an offer that was made back in  
4 2000 as part of an ongoing negotiation between ACQIS and  
5 IBM, for ACQIS to license all of its modular computing  
6 technology to IBM for a flat fee.

7 And I also considered that the BladeCenter  
8 product line for IBM has never been profitable. And all  
9 of those were things Misters Murtha and Vellturo  
10 ignored.

11 Q. So you said that you were here in the  
12 courtroom to hear Mr. Murtha and Mr. Vellturo testify.

13 Are there any points on which you agree with  
14 Mr. Murtha and Mr. Vellturo?

15 A. Yes. In fact, I've prepared some slides, and  
16 if you want to go ahead and put those up. I think it's  
17 the first slide.

18 Q. Okay. Could you please tell the jury about  
19 the areas in which you agree with Mr. Murtha and  
20 Vellturo?

21 A. So the core assumption that I had to make,  
22 which I just discussed a moment ago, was I'm assuming  
23 for purposes of my work that the patents are valid,  
24 enforceable, and infringed.

25 Second, I used that same Georgia-Pacific

1 framework. I don't know if you remember hearing those  
2 words from last week. But it was a long list of factors  
3 that damages experts consider to determine what a  
4 reasonable royalty would be. I considered those.

5 And I also assumed that these parties did this  
6 hypothetical negotiation in early 2008.

7 Q. Let's talk about this hypothetical  
8 negotiation.

9 MS. CANDIDO: If you would bring up the  
10 next slide, Ryan.

11 Q. (By Ms. Candido) Mr. Ratliff, what does this  
12 depict?

13 A. So I don't know how clear this was last week,  
14 because, again, everybody has been hurrying their  
15 evidence along; but what you're going to be instructed  
16 to do is to consider, if you get to the issue of  
17 damages, what the parties would have agreed to in a  
18 hypothetical negotiation.

19 So I put the picture of the table here. I've  
20 shown the patent. I've shown those Georgia-Pacific  
21 Factors as an icon that we'll talk more about. But you  
22 have ACQIS as the licensor, and what they bring to the  
23 table is a bare patent license to these three  
24 continuation patents.

25 They are negotiating what a fee would be to

1 give IBM the right to use those.

2 And if we go to the next slide, we'll see what  
3 IBM brings to the table.

4 IBM brings its successful modular computing  
5 system that already existed in 2008. IBM had been on  
6 the market with that since 2004.

7 You've heard about the software that it takes  
8 to run these systems. You know that IBM's got to go out  
9 there and sell these and support these and market these  
10 products in order to make the sales so that entire sales  
11 force gets on the ground.

12 The customer support facilities and all their  
13 business processes and systems and, of course, the IBM  
14 name, its brand value and reputation. And you've heard  
15 over and over again about its thousands and thousands  
16 and thousands of patents that are part of this  
17 portfolio, both for things it makes and to protect the  
18 things that it makes.

19 Q. Now that we know what both parties bring to  
20 the table, what happens next?

21 A. So the next slide is the Georgia-Pacific  
22 Factors. So once we're all at the table, we consider  
23 these factors, considerations -- lots of words you can  
24 use for it -- that parties who are doing licenses in the  
25 business world as opposed to in court, but they do them

1 in the business world, what do they think about.

2 All I've done that's different than what you  
3 saw last week is I've organized them in categories to  
4 make them a little easier to talk about.

5 So some of the factors relate to licensing.  
6 That first factor, licenses by ACQIS of the  
7 patents-in-suit. You've heard about those settlement  
8 agreements.

9 The second factor, rates paid by IBM to others  
10 for technologies similar to the patents-in-suit. We're  
11 going to hear about some of IBM's licensing related to  
12 BladeCenter.

13 You look at financial considerations, and  
14 those financial considerations will include things like  
15 were the products profitable? If there were any  
16 profits, how much were they and how much did IBM  
17 benefit?

18 And then on the technical side, I'm certainly  
19 not going to go back through all the claims you heard  
20 earlier today. That's not my job. I'm not an engineer.  
21 But I have to understand the commercial significance of  
22 the technology and whether it's important and how  
23 significant it is.

24 And those are the kinds of things that people  
25 who are negotiating a license typically consider.

1 Q. Okay. Let's start with the technical product  
2 considerations.

3 A. All right. If you will pull up the next  
4 slide.

5 Q. What is this?

6 MR. FRIEL: Your Honor, objection. May  
7 we approach?

8 THE COURT: Yes, you may.

9 MR. FRIEL: If you will take the slide  
10 down.

11 (Bench conference.)

12 MR. FRIEL: Your Honor, here is the slide  
13 in question. Our objection is to the last bullet, and  
14 it leads to a number of the other exhibits or  
15 demonstratives as well. And the problem that we see  
16 with it is it's violating Your Honor's order motion in  
17 limine.

18 And I have it here, if you want to  
19 refresh your memory.

20 MS. CANDIDO: Your Honor, the purpose of  
21 this motion in limine was to exclude prejudicial large  
22 billion-dollar numbers from the jury's ears with respect  
23 to IBM's total revenues or IBM's total server revenues.

24 But all the use in the slide that  
25 Plaintiff is objecting to are these market share figures

1 to show the relative size of IBM or HP.

2 THE COURT: All right. The objection is  
3 overruled.

4 MS. CANDIDO: We will, from the other  
5 side as well, if I can go for it.

6 MR. FRIEL: That's right.

7 MS. CANDIDO: Thank you.

8 MR. FRIEL: And Your Honor, will it  
9 continue -- may we have a continuing objection to those  
10 demonstratives that have the financial information  
11 outside of the accused products as well?

12 THE COURT: Now, I mean, if they start  
13 talking about how much versus percentage, then --

14 MS. CANDIDO: We don't intend to do that.

15 MR. FRIEL: All right. Thank you.

16 (Bench conference concluded.)

17 MS. CANDIDO: Ryan, if you can please  
18 bring back up that last slide.

19 Q. (By Ms. Candido) So, Mr. Ratliff, would you  
20 explain what you have prepared on this slide?

21 A. So it's a quick summary.

22 You've heard direct testimony in court that  
23 ACQIS did not invent serial PCI or switches, much less  
24 blade servers or computer modules. That's not what this  
25 case is about.

1           What you've also heard about is some very  
2 small subcomponents of the entire BladeCenter system  
3 that directly involve the invention that Dr. Chu has  
4 claimed.

5           You've heard those again referred to as the  
6 chipset and the hub controller or the switch. And what  
7 we know is what's alleged; there's been some minor  
8 improvement in taking things that were known in other  
9 contexts and trying to bring them to a BladeCenter  
10 environment.

11           We know that's a very, very small part of a  
12 very, very big product. You've seen pictures of it.  
13 You know what they look like. You've seen the small  
14 parts that are impacted.

15           And finally, what we know is that there's  
16 other products that serve the same purpose. And for  
17 IBM, those other products are about 96 percent, and in  
18 some years a little more, of the total servers it sells,  
19 meaning these BladeCenter products that you're hearing  
20 about are something less than 5 percent of the servers  
21 that it sells.

22           Q. The jury has been hearing this term,  
23 acceptable non-infringing alternatives. What's the  
24 significance of that in connection with the hypothetical  
25 negotiation?

1           A.     So, again, I told you I'm not an engineer, so  
2     I'm not going to give you a technical definition.  
3     From a commercial perspective, an acceptable  
4     non-infringing alternative means a product which you  
5     could sell instead of the product that's been accused of  
6     infringement that customers would accept.

7           Q.     And do you have some examples of the available  
8     non-infringing alternatives?

9                     I believe that's the next slide.

10          A.     Yes.  If you turn to the next slide there,  
11     I've taken pictures.  You've seen already in talking  
12     with Mr. Yost from IBM and in talking with the technical  
13     experts you've heard from.  You've seen discussions on  
14     the -- far left of your screen -- the iDataPlex, which  
15     is a form of rack server; on the far right-hand side, a  
16     tower server; and then certain types of BladeCenter  
17     servers that have not been accused of infringement,  
18     these are all alternatives.  And as I said, that  
19     represents over 96 percent of the server systems that  
20     IBM sells.

21                   And the next slide shows us quantitatively --  
22     the blue is all the other server systems, and the yellow  
23     is the small part associated with the accused blade  
24     servers.

25          Q.     In your opinion, what impact on the royalty

1 rate would these hypothetical -- I'm sorry -- would  
2 these available non-infringing alternatives have?

3 A. As a general proposition, because, remember,  
4 we're at the table negotiating, right? You're going to  
5 see lot of data, but keep reminding yourself this is  
6 information you're exchanging as you're negotiating a  
7 license.

8 So if you are the one being asked to take a  
9 license, but you know you have alternatives that you  
10 could sell instead, that's going to make you less  
11 interested in taking a license generally, but we have to  
12 assume that the license is done here. That's how you're  
13 going to determine damages, but you're going to pay less  
14 for that than if you didn't have those alternatives.

15 Q. Let's turn now to commercial considerations.

16 MS. CANDIDO: If you could bring up the  
17 next slide, Ryan.

18 Q. (By Ms. Candido) The first bullet you have  
19 relates to ACQIS and IBM were not competitors.

20 Why is that significant?

21 A. So now we're moving on from technical things  
22 to more business and finance kind of topics. And at the  
23 outset, I point out that a party who's got technology  
24 who's licensing to another party, but they're not  
25 competing with that party in the marketplace.

1           So ACQIS wasn't making a product that was  
2     competing with the BladeCenter products. So if ACQIS or  
3     if IBM makes a sale, ACQIS doesn't lose a sale.

4           Whereas in other settings, you have  
5     competitors that are trying to license. You might have  
6     HP and Dell. You might have IBM and Dell and they're  
7     trying to negotiate a license.

8           Well, it may be that if a license is granted,  
9     that other company is going to be making sales using  
10    your technology and taking sales away from you. In that  
11    instance, you'd have to get a higher royalty to offset  
12    those lost sales.

13          Here, we don't have that, though, because  
14    ACQIS isn't making a product. Anything IBM sells that  
15    they would get the royalty on, they benefit with no  
16    detriment.

17          Q.    And what are the other commercial  
18    considerations that you looked at?

19          A.    The other three, very quickly, you've heard  
20    about ACQIS' early version and early efforts to create a  
21    sort of blade server type of technology, the Interputer.  
22    You heard that that was not a commercial success. They  
23    pulled it off the market and focused on licensing.

24          You also heard Mr. Yost testify last week that  
25    IBM had not yet been profitable on its blade server

1 products. Now, they have been profitable overall on  
2 their rack and their tower products, but not on their  
3 blade server products.

4 In fact, if you look at the actual financial  
5 information, basically IBM's losing -- for every million  
6 dollars they sell of blade server products, they lose  
7 about a hundred thousand dollars in the current  
8 environment. It's about 10 percent.

9 And then the last subject that I raised  
10 there -- and this was really because I think you may  
11 have heard some testimony last week that wasn't quite  
12 clear.

13 In 2004, IBM had 40 percent of the U.S. blade  
14 server market, meaning that 4 out of every 10 blade  
15 servers sold in the U.S., IBM was the one who sold it.

16 By 2008, at the hypothetical negotiation, IBM  
17 was only selling about 2 out of every 10. HP had  
18 surpassed it.

19 Q. And what impact would these factors have on  
20 the royalty rate that you had as the outcome of the  
21 hypothetical negotiation in 2008?

22 A. Again, generally speaking, when you're  
23 licensing technology that hasn't been proven successful  
24 before you license it, you're not going to be sure it's  
25 really worth paying a royalty on. It's going to drive

1 the royalty down.

2 And for products that are not profitable, you  
3 have no room to pay a royalty, right? You're already  
4 losing money. The royalty is going to make the loss  
5 worse.

6 Q. Let's change here and talk about the last  
7 category, the licensing.

8 MS. CANDIDO: Ryan, would you pull up the  
9 next slide, please?

10 Q. (By Ms. Candido) Mr. Ratliff, this references  
11 a license proposal by ACQIS to IBM in 2000.

12 What was that proposal?

13 A. So just to give you a little roadmap, we're  
14 going to talk about two subjects here under licensing  
15 this offer and then the actual IBM licenses.

16 So there was an offer made by ACQIS in 2000 to  
17 IBM to license to it all of ACQIS' patents and other  
18 intellectual property related to modular computing that  
19 existed then and in the future.

20 And in exchange for that grant of rights, IBM  
21 was going to pay \$5 for each module and \$2 for each  
22 peripheral device. And so you know this Interputer  
23 ended up not being a commercial success, but still  
24 relevant to what we're doing here, because it does  
25 represent an early stage of the blade type of

1 technology.

2 And in today's BladeCenter products, there is  
3 a module -- it's that blade, the blade server itself --  
4 and there are peripheral devices. You've heard about  
5 the chassis and the switch.

6 So, in effect, this is telling us on that type  
7 of structure that IBM would be expected to pay \$5 for  
8 each blade and \$2 for each chassis and switch that it  
9 sold.

10 Q. Before you move off this actual proposal, in  
11 ACQIS' proposal, did the proposed royalty rate change,  
12 if ACQIS got additional patents?

13 A. It did not.

14 Q. Was the ACQIS' proposal a bare patent license?

15 A. It was not. And you've heard that phrase  
16 before, the bare patent license, meaning all you're  
17 doing is granting the patent rights. But out in the  
18 business-world licenses, I'll tell you it's very, very  
19 rare that a license only contains a grant of patent  
20 rights in exchange for a fee. They almost always  
21 include other things going both ways.

22 So in this particular proposal, in addition to  
23 ACQIS offering its patents that include both its present  
24 and future patents, it also included other intellectual  
25 property. That could be trade secrets, trademarks,

1 copyrights, any other type of intellectual property it  
2 had, plus they were also going to provide design  
3 assistance in helping IBM develop these products for  
4 commercialization.

5 Q. All right. Going back to the rate you  
6 mentioned earlier, have you calculated what royalty IBM  
7 would have had to pay ACQIS for its sale of BladeCenter  
8 during the damages period using the rates in ACQIS'  
9 licensing proposal?

10 A. Yes. If you pull up the next slide, what I  
11 did was take the products that have been accused of  
12 infringement, and I took the count of the blades and the  
13 count of the chassis and the account of the switches,  
14 and I applied \$5 per blade and \$2 per chassis and switch  
15 to those accused sales from 2008, April through first  
16 quarter of 2011, here we are at trial, and that came to  
17 a total of \$1.3 million.

18 Q. How does that compare with ACQIS' damages  
19 demand in this case?

20 A. I denote a little bullet point. So if you  
21 convert the \$27 million, that works out to about \$115  
22 per module as opposed to \$5. And depending on which --  
23 whether it's a chassis or a switch, anywhere from 207 to  
24 \$312 as opposed to \$2.

25 Q. So the 1.3-million-dollar royalty figure, does

1 that reflect the maximum that IBM would have had to pay  
2 ACQIS for the accused products in this case had the  
3 parties entered into this license agreement?

4 A. Yes.

5 MR. FRIEL: Objection. Outside the  
6 scope.

7 THE COURT: Outside what?

8 MR. FRIEL: The scope. I'm sorry. The  
9 scope of his report.

10 THE COURT: Oh, the scope of his report?  
11 Counsel, is that covered in his report?

12 MS. CANDIDO: Yes, it is, Your Honor.

13 THE COURT: All right. Y'all approach.  
14 (Bench conference.)

15 MR. FRIEL: I think based on the ACQIS  
16 license offer in 2000 whether that meets the maximum  
17 amount, and it's not what he testified to.

18 MS. CANDIDO: I can't find the exact  
19 spot, Your Honor, but I know that he said that he  
20 believes it sets a ceiling for what ACQIS would have  
21 expected from IBM and the ceiling of what IBM would have  
22 had to pay.

23 MR. FRIEL: But not for the accused  
24 products. That was for the Interputer license.

25 MS. CANDIDO: The figures are right here

1 in Paragraph 66?

2 MR. POWELL: It's right here in his  
3 report.

4 MR. FRIEL: Can I have my exhibit back,  
5 please?

6 THE COURT: Overruled.

7 (Bench conference concluded.)

8 Q. (By Ms. Candido) Mr. Ratliff, I am not sure  
9 you got a chance to answer that question. Let me ask  
10 you, does this \$1.3 million reflect the maximum in your  
11 opinion that IBM would have had to pay had they entered  
12 into the license proposal with -- from ACQIS?

13 A. Yes.

14 Q. We've looked at this licensing proposal from  
15 ACQIS.

16 Did you otherwise look at IBM's licensing  
17 practices and some of its actual licenses?

18 A. I did.

19 Q. Did you consider --

20 A. Go ahead.

21 Q. Sorry. Did you consider your interview with  
22 Michele Baumgartner, IBM's Director of Licensing, and  
23 her testimony here at trial?

24 A. I did, as well as the numerous IBM licenses  
25 that were produced in this case that I reviewed and

1 other IBM licenses that are publicly available.

2 MS. CANDIDO: Could you bring up the next  
3 slide, please, Ryan?

4 MR. FRIEL: Your Honor, I believe we have  
5 an objection to this one, too. May we approach?

6 THE COURT: Yes, you may.

7 (Bench conference.)

8 MR. FRIEL: Your Honor, that one is not  
9 in his report.

10 THE COURT: Where, right here  
11 (indicates)?

12 MR. FRIEL: Any of it. This is the  
13 question and answer from the trial. He relied on an  
14 interview, and there were couple of other spots of  
15 testimony that was not included in his report.

16 MS. CANDIDO: He relied on an interview  
17 with her and the deposition transcript. And as I  
18 understand, both parties have been allowing their  
19 experts to testify with the respect to previous  
20 testimony in this case as it's relevant to their  
21 previously formed opinions that were disclosed in their  
22 reports, which this is.

23 THE COURT: Had you heard about this  
24 before, though, either by report or deposition?

25 MS. CANDIDO: The jury has heard about

1 this from Ms. Baumgartner, and it's in his report about  
2 IBM's customary licensing practices, from his  
3 discussions with Michele Baumgartner --

4 THE COURT: Okay. Overruled.

5 MS. CANDIDO: IBM taking a single  
6 license.

7 MR. FRIEL: Your Honor, one moment if I  
8 may.

9 The problem is that these are not  
10 statements that are in his report. He's using the trial  
11 testimony in a way that hasn't been previously  
12 disclosed. He can rely on his report. I have no  
13 problem with that, but to put this up where we have not  
14 been able to --

15 THE COURT: Well, how does that prejudice  
16 you?

17 MR. FRIEL: Well, we weren't able to  
18 cross-examine him on it.

19 THE COURT: Well, cross-examine him, you  
20 mean in deposition?

21 MR. FRIEL: Correct, and the other  
22 remaining --

23 MS. CANDIDO: It's no different than  
24 letting Mr. Gafford testify about --

25 THE COURT: Overruled.

1 MR. FRIEL: Thank you.

2 (Bench conference concluded.)

3 MS. CANDIDO: Ryan, if you could bring  
4 that up slide, please.

5 Q. (By Ms. Candido) Mr. Ratliff, is this  
6 testimony that you reviewed and considered?

7 A. It is. I put together a few slides with  
8 excerpts. We've got one here and a few more in a  
9 minute.

10 So just quickly, you heard IBM's Director of  
11 Licensing, Ms. Baumgartner, last week testify that when  
12 IBM pays lump sums on licenses to get other people's  
13 technology, her experience is that the general range has  
14 been 1 to 4 million, and that includes not only a patent  
15 or licensing but other continuations of the entire  
16 patent family. They don't pay extra for that.

17 Q. You mentioned that you reviewed actual IBM  
18 license agreements.

19 MS. CANDIDO: Ryan, would you bring up  
20 the next slide, please?

21 Q. (By Ms. Candido) Does this slide reflect some  
22 of those license agreements?

23 A. It does. I identified the licenses that  
24 either related to BladeCenter or were technology that  
25 were related to use in a BladeCenter type of server

1 system.

2 The most recent one you see on the far left  
3 was with Netezza. Netezza makes a product that they  
4 wanted to be compatible with IBM's BladeCenter products.  
5 And so IBM licensed them the technology so that they  
6 could make that compatible.

7 The next one you'll see, Ciena, dealt with the  
8 multiplexing of signal communications. You've heard  
9 about the microchips in this case, the chipset and how  
10 there's signals going through the wiring on those. And  
11 this deals with the multiplexing that occurs which  
12 determines what traffic on those signals is going to go  
13 when and where. They had products related to that that  
14 they needed this license for.

15 And then the Systemax license which dealt with  
16 personal computer based data storage, data processing  
17 types of systems, and you'll see the range here was  
18 between 450,000 and 2.9 million, which is very  
19 consistent with that 1-to-4-million-dollar range that  
20 you heard from Ms. Baumgartner.

21 Q. These dollar values on this chart relate to  
22 lump-sum payments?

23 A. All of these are lump-sum payments.

24 Q. Did Mr. Murtha consider these IBM real-world  
25 license agreements in his analysis?

1 A. He did not.

2 Q. You are familiar with Ms. Baumgartner's  
3 testimony about IBM's preference for the type of  
4 royalties and IBM licenses, right?

5 A. Yes. And from reviewing the licenses,  
6 generally it's a cross-license, but when it's not either  
7 way, it's a lump-sum payment.

8 Q. IBM's preference is for lump-sum royalties?

9 A. That's correct.

10 Q. You're familiar with the ACQIS settlement  
11 agreements that have been discussed in this case and  
12 what type of structure they used for a royalty?

13 A. Yes. All of them for the past sales were lump  
14 sums.

15 Q. I think you've summarized the parties'  
16 approach to the royalty structure in their own licenses  
17 in a slide, if we see the next slide.

18 A. Yes, the next slide.

19 So just to recap, all the ACQIS settlement  
20 agreements for the past sales were a lump sum. And for  
21 those where future rights were granted, with one  
22 exception, all of those, the lump sum, covered the  
23 future sales as well.

24 The three comparable IBM licenses were for  
25 lump sums, and IBM's practice, when they don't just do a

1 cross-license, is for a lump sum.

2 Q. Is it your conclusion, then, that the parties  
3 in this case would have agreed on a lump sum in the  
4 hypothetical negotiation?

5 A. Yes. That is clear from their past practices.

6 Q. You heard ACQIS' position that they believe  
7 that they're entitled to a 1-percent-per-patent royalty  
8 for each of their three continuation patents?

9 A. Yes.

10 Q. What's your response to that?

11 A. So based on the IBM licenses I've reviewed,  
12 based on the IBM licensing practices, based on what the  
13 parties did in their actual agreements, I have not seen  
14 any where there was 1 percent paid for a patent and  
15 whatever royalty was paid, always included continuations  
16 for other patents in the patent family.

17 Q. Again, on these issues, you've interviewed  
18 Ms. Baumgartner, IBM's Director of Licensing, and you're  
19 familiar with her testimony at trial; is that right?

20 A. That's correct.

21 Q. Did you prepare any slides on that testimony?

22 A. I did.

23 And if you'll turn to the next one, I'm going  
24 to move through these pretty quickly. This is just to  
25 highlight things that you already heard last week. They

1 were things I had heard by interviewing Ms. Baumgartner  
2 and reviewing the documents, but this provides a good,  
3 quick summary.

4 In the first slide, in the past 10 years,  
5 she's never seen IBM pay 1 percent for a patent in the  
6 computer sector.

7 If we move on to the next one.

8 Also, she has not seen people coming to  
9 license with IBM who are suggesting that they expect to  
10 pay or expect IBM to pay 1 percent per patent with the  
11 5 percent, and she has not seen that to be any kind of  
12 industry standard or referenced as an industry standard.

13 If we turn to the next one.

14 I pulled out excerpts from a couple of the  
15 licenses. You heard about ACQIS' Fujitsu license last  
16 week. I just mentioned IBM's Systemax license?

17 Remember, it was the third one in the table  
18 that I showed you.

19 Both of those I pulled out the definition of  
20 what a patent is; and in each case, the patent means  
21 continuations. So if there's a patent and there's four,  
22 five, six, seven, however many, continuations, those, as  
23 a group, are all one patent for licensing purposes.

24 They're still patents. They carry whatever  
25 weight the patent carries, but for licensing purposes,

1 they're treated as one.

2 If we go to the next slide.

3 Ms. Baumgartner confirming her experience  
4 consistent with that. If she was licensing a patent and  
5 a second patent was a continuation of that, she would  
6 not expect that she would pay more for that second  
7 patent.

8 And I think we have a final slide. When IBM  
9 is in-licensing or out-licensing, either way, they don't  
10 expect to pay more or receive more when there's  
11 additional patents involved.

12 Q. So in your opinion, do IBM's licensing  
13 practices and actual real-world patent licenses support  
14 the 3-percent running royalty rate that ACQIS proposes?

15 A. They do not.

16 Q. Does that complete your analysis regarding the  
17 direct considerations that you thought were most  
18 important to the hypothetical negotiation?

19 A. Yes. That addresses the things that I  
20 considered affirmatively in trying to understand --  
21 remember, we're back at the table. We're exchanging  
22 this information. What's the royalty we're going to  
23 agree on, taking all of that into account.

24 But there were some additional issues raised  
25 during the testimony of Mr. Murtha and Vellturo and in

1 their reports that I think require some correction and  
2 clarification that I need to address as well.

3 Q. Okay. Let's move to the first of those. I  
4 believe that's -- well, actually, may I ask, can you  
5 identify the criticisms that you have or the  
6 corrections, as I believe the word you used?

7 A. Two big-picture issues. The first one has to  
8 do with how to properly compare the hypothetical license  
9 to those settlement licenses you heard about. And the  
10 other one has to do with what's the proper royalty base  
11 you should be considering for this lump sum.

12 I think we have a slide to get us started.

13 Q. Okay. So let's start with the ACQIS  
14 settlement agreements.

15 MS. CANDIDO: I believe we have a slide  
16 on that, Ryan, DX Demo 1620.

17 Q. (By Ms. Candido) You said you compared those  
18 ACQIS settlement agreements with the hypothetical  
19 license between ACQIS and IBM?

20 A. Yes. So what we tried to do here is to  
21 display on the left what the hypothetical license is  
22 going to relate to, and on the right, what we found in  
23 the settlement licenses.

24 So this hypothetical license that you're  
25 thinking about in this hypothetical negotiation that

1     you're using to determine damages, based on what you  
2     have seen and heard, there's going to be a lump sum.

3             It's only going to involve U.S. rights, okay?  
4     Only U.S. rights, because that's all these patents  
5     cover.

6             And it only covers what's happened in the  
7     past. And in particular, from approximately April of  
8     2008 to the end of this trial, that's what you're  
9     deciding, is what happens during that time period.

10            What happens in the future is not part of what  
11     you're going to be considering at this point. That's  
12     all the hypothetical license is.

13            But if we compare that to the settlement  
14     licenses, again, we saw that all of those as to past  
15     infringement were lump sums. And almost all of those  
16     that granted future rights also included that in the  
17     lump sum.

18            They did grant U.S. rights, but they also  
19     granted, in most cases, either foreign or worldwide  
20     rights. They covered the past, but they also covered  
21     the future. It included patents beyond just the three  
22     continuation patents that you heard about in this case.

23            And most of those licenses went all the way  
24     out until the patents expire in 2020.

25            Q.     Were there any exceptions to this amongst the

1 settlement licenses?

2 A. There were two agreements you heard about next  
3 in Appro where there was only a settlement related to  
4 what had come before, and neither party was really  
5 making any products in the future that were settled as  
6 part of that agreement.

7 Then you heard about one other where ACQIS  
8 made an investment in the company it settled with and  
9 agreed to a small royalty on a small amount of sales in  
10 the future. But for all the rest of them, these  
11 basically apply.

12 Q. So based on all the settlement licenses, which  
13 one involved the party that in the blade server market  
14 is most like IBM?

15 A. In the blade server market, you have HP, you  
16 have IBM, and you have everybody else. So HP's really  
17 the only other major player.

18 Q. Okay. So let's talk about ACQIS' settlement  
19 agreement with HP. I believe you prepared a slide on  
20 that.

21 A. Yes.

22 Q. What were the terms of HP's settlement with  
23 ACQIS?

24 A. Just so you're clear, HP is in yellow. IBM is  
25 in the blue. The HP license covered from April 2004 to

1 April 2020. HP paid \$30 million for that license. They  
2 got covered for past and future sales. They got  
3 additional patents that aren't part of the patents that  
4 you're considering in this case. They got worldwide  
5 rights, and it was a lump sum.

6 In comparison, what ACQIS has demanded in this  
7 case is a running royalty that through this -- you know,  
8 through the date of the sales data they have put forth  
9 in this case, works out to about \$27 million.

10 And the hypothetical license that you're  
11 considering only covers that period from April 2008 to  
12 February 2011. So it's less rights, shorter period, but  
13 a very similar amount.

14 Q. Is it possible to compare the HP settlement to  
15 the hypothetical license based on the differences  
16 between HP and IBM in size and the differences in the  
17 timeframes that you've set forth in this slide?

18 A. Yes, you can do some basic math to compare it.  
19 It may be easier for me to hop up to the chart and draw  
20 that out.

21 MS. CANDIDO: Your Honor, may the witness  
22 approach the easel?

23 THE COURT: Yes, he may.

24 THE WITNESS: Thank you, Your Honor.

25 Q. (By Ms. Candido) And if you would,

1 Mr. Ratliff, would you please walk us through the  
2 comparison between HP and IBM.

3 THE WITNESS: You think I need that?  
4 Y'all think I need that?

5 THE COURT: Yes, you do need the  
6 microphone.

7 THE WITNESS: You need it.

8 THE COURT: The Court Reporter does.

9 THE WITNESS: Good point, Your Honor.

10 A. All right. So I'm going to write a few things  
11 down from this slide just to get us started.

12 So we're starting out at the top with HP, and  
13 I'm going to put 30, but we all know that's \$30 million.  
14 And what we're trying to figure out is how we compare  
15 that, which is the long yellow line, to what would be  
16 the equivalent of that for IBM -- yes, thank you -- so  
17 what would be the equivalent of that for IBM for that  
18 short a time period.

19 So the first thing that we know is that longer  
20 time period is about 16 years. I'm going to put that  
21 over here for now. And that shorter time period is not  
22 quite 3 years; but just to make the math easier, I'm  
23 going to start it out at 3 years.

24 I'm going to come back and do some math with  
25 that, but that's what we call the time part of the

1 adjustment.

2 The other adjustment -- if we put up the next  
3 slide -- is to understand the relationship between what  
4 HP was selling and what it got a license for as opposed  
5 to what IBM was selling.

6 And so I pulled from IDC -- and you heard  
7 about that source last week; it's the source that  
8 financial experts use for industry data -- and we saw in  
9 2008, Hewlett-Packard was about 55 percent of the  
10 market, and IBM was only about 22 percent of the market.

11 So I'm going to call this market share, but it  
12 really has to do with the sales that are being covered.  
13 And what I'm going to do over here is put that  
14 fraction -- it's 22 out of 55, and we all learned some  
15 good reminder math last week. I can cancel out what's  
16 common, so I know the fraction is 2/5ths between IBM and  
17 HP. So that's about 40 percent.

18 And if I multiply that 30 million by 40  
19 percent, that gives me 12 million. So just based on the  
20 amount of sales alone, comparing IBM to HP, IBM would  
21 only be paying about 40 percent of what HP would be  
22 paying, everything else being equal.

23 But it's still for a longer period of time.  
24 So over that 16 years, HP is going to have a lot more  
25 sales that are being covered compared to IBM, which is

1     only getting a license for about 3 years.

2             Now, this doesn't give us quite as neat a  
3     number as the 40 percent, but it's about 20 percent,  
4     right? Because we know 3 goes into 15, 5 times, about  
5     1/5th. So I'm going to use that just for simplicity.

6             That's about 20 percent. So IBM's term of  
7     license is only about 20 percent of what HP's was.  
8     So if I do that math, that comes out to about 2.4  
9     million comparing IBM to HP in terms of amount and time.

10     Q.     So -- thank you very much.

11             Just based on the difference in time and the  
12     difference in market share, comparing the 30 million  
13     that HP paid to the hypothetical license tells us that  
14     IBM should only have to pay 2.4 million.

15             Is that what you're telling us?

16     A.     If you were doing that comparison, yes.

17     Q.     And just briefly, did you also perform an  
18     effective royalty rate calculation for the HP agreement  
19     similar to the type of effective reasonable royalty  
20     agreement that Mr. Vellturo testified about?

21     A.     Yes.

22             Let's go to the next slide.

23     Q.     Could you explain what you've done in this  
24     slide, please?

25     A.     Yes. So, again, you heard last week about the

1 IDC data, and so what I did was I looked at HP's sales  
2 that had happened from 2004 to 2009. Then there were  
3 projections in the IDC data for the amount of sales  
4 growth that would occur in 2010, '11, '12, and '13.

5 And then Mr. Vellturo, in one of his  
6 computations, made a projection of that continued growth  
7 out into the future. So I used that same growth model,  
8 plus the IDC sales data. I used a discount rate -- you  
9 heard about that -- to bring those sales back to the  
10 present, because they're out in the future and not worth  
11 as much today as they are in the future.

12 And if I compared that amount to the 30  
13 million, the 30 million was only about .12 percent of  
14 those past and future expected U.S. sales.

15 Q. And the .25 percent bar in the middle, that's  
16 what would be effective royalty rate under your damages  
17 calculation; is that correct?

18 A. Right. Based on the \$3.5 million that I told  
19 you about at the start of my testimony that I believe  
20 would be the reasonable royalty, that works out to about  
21 .25 percent of the IBM accused sales that would have  
22 occurred between April 2008 and February of 2011, which  
23 is this month.

24 Q. Well, I'm just going to go through a couple of  
25 these last points a little more quickly.

1 MS. CANDIDO: If you could bring up the  
2 next slide, please, Ryan.

3 Q. (By Ms. Candido) You talked earlier about the  
4 fact that you don't think 3 percent is appropriate.

5 Can you explain what this slide tells you?

6 A. So, again, what we know is that ACQIS has  
7 asked for what amounts to a 1 percent per patent, or  
8 3-percent royalty, and that's what's necessary to get to  
9 the \$27 million. Again, what this is showing is that  
10 for purposes of licensing, even if we assumed the proper  
11 rate was 1 percent per patent -- and understand, I've  
12 not seen any evidence to support that -- but assuming  
13 that was the proper rate, again, the continuations  
14 wouldn't count. So at most, it would be that 1 percent.

15 Q. So even though you don't agree with the 1  
16 percent, you've calculated what the damages would be  
17 using Plaintiff's royalty base, I think on the next  
18 slide?

19 A. I have. The next slide just shows some basic  
20 calculations. What you can see in the first row is the  
21 amount of accused sales that Mr. Vellturo included in  
22 his report. And if that was at 1 percent, that would be  
23 \$9 million as opposed to 27 million.

24 However, that includes the blades, the  
25 chassis, and the options. And you've heard testimony

1 about the core components that are most directly  
2 affected by the invention that's been asserted by ACQIS.

3 And if we just focus on the blade and the  
4 chassis, that number goes down dramatically, over \$300  
5 million in base, and would give you a royalty of only  
6 about 5.8 million.

7 Q. And then in the last two rows, you've  
8 recalculated the first two rows, but this time excluding  
9 the unassembled sales that the jury's heard about  
10 earlier today; is that right?

11 A. Yes. You heard from Professor Conte about the  
12 unassembled sales and the infringement.

13 Just so you're clear, now talking more from a  
14 business perspective than a technical perspective, IBM's  
15 sales of these blade server products, but about 46  
16 percent of those sales are not sold as complete systems.  
17 They are only sold as components.

18 And since it takes a system working together  
19 to be accused of infringement, I've done a separate  
20 calculation here showing what would happen if you took  
21 46 percent out of that. And you see those two  
22 calculations there on the options; blade and chassis.  
23 That's about 4.9 million; and just on the blade and  
24 chassis, 3.1 million.

25 Q. Okay. I think we've covered everything. I'm

1 just going to bring up your last slide briefly, and  
2 without running through these items again, I just want  
3 to confirm it's your opinion that a reasonable royalty  
4 in this case would be 3.5 million or less; is that  
5 right?

6 A. That's correct.

7 MS. CANDIDO: I pass the witness.

8 THE COURT: All right.

9 Cross-examination.

10 CROSS-EXAMINATION

11 BY MR. FRIEL:

12 Q. Good afternoon. How are you, Mr. Ratliff?

13 A. I'm good. How are you?

14 Q. I'm doing very well. A little warm today,  
15 but...

16 Let me ask you a few questions about your  
17 background. You have an accounting degree, you said; is  
18 that correct?

19 A. Yes.

20 Q. You have a law degree?

21 A. Yes.

22 Q. You don't have any electrical engineering  
23 degrees?

24 A. No.

25 Q. No computer engineering or computer science

1 degrees?

2 A. No.

3 Q. So no type of engineering degree at all?

4 A. Correct.

5 Q. So you wrote an expert report in this case in  
6 November of last year; is that right?

7 A. Yes. My first report was in November.

8 Q. Okay. And then you did a supplement a little  
9 while ago, right?

10 A. Yes.

11 Q. And your report contains your opinions about  
12 what IBM should pay to use Dr. Chu's inventions; is that  
13 correct?

14 A. Yes. At those different timeframes, yes.

15 Q. And you agree that your expert reports are a  
16 very important document or documents in these matters,  
17 right?

18 A. Yes.

19 Q. And you were truthful in writing these  
20 reports?

21 A. That's my belief.

22 Q. You were as thorough and complete as could be  
23 because you knew that mistakes could cost one side or  
24 the other literally millions of dollars, right?

25 A. I don't know that we really think of it that

1 way when we're writing reports. I think we're trying to  
2 do the best job we can based on the information  
3 available and the time constraints we have. So that's  
4 what I attempted to do.

5 Q. All right. Fair enough.

6 Now, you opined in your report that rack  
7 servers are alternatives to blade servers that are  
8 commercially acceptable, right?

9 A. I make that statement, but the opinions  
10 actually came from my discussions with others.

11 Q. Okay. Well, you didn't -- let's talk about  
12 the others. You didn't talk to any IBM customer and ask  
13 them why they purchase blade servers instead of a rack,  
14 right?

15 A. No. Instead, it was information that was  
16 produced in the case about the benefits and features in  
17 discussions with IBM sales personnel.

18 Q. Okay. So the answer is, no, you didn't,  
19 right?

20 A. Not to the customer directly, that's correct.

21 Q. And you didn't talk to any IBM customer  
22 directly as to why they would purchase a rack instead of  
23 a blade server, right?

24 A. Correct.

25 Q. And you didn't directly talk to any IBM

1 customer about whether they considered rack servers to  
2 be a commercially acceptable alternative to blade  
3 servers?

4 A. Yeah. I don't know how that would work.  
5 Those aren't really the kind of questions you ask  
6 customers.

7 Q. Well, more importantly, that's not the kind of  
8 questions you asked anyone, right, any IBM customer  
9 directly.

10 A. I didn't ask an IBM customer that question,  
11 no.

12 Q. And at the time you wrote your report, you  
13 didn't have any information on the benefits of a blade  
14 server over a rack server; is that right?

15 A. I believe at the time of my deposition, when I  
16 was asked specific questions, I didn't have things at  
17 hand to answer that. I believe in the materials I  
18 reviewed, there were promotional brochures about all the  
19 products.

20 Q. Okay. Now, your deposition was taken in this  
21 case the 1st of November; is that right?

22 A. Yes.

23 MR. FRIEL: Could we play, let's see,  
24 from Page 58, Lines 10 through 20?

25 (Video playing.)

1 QUESTION: So when you formed your  
2 opinion in this case, you didn't have any information on  
3 the benefits of a rack server over a blade server?

4 ANSWER: That's correct. I did not  
5 discuss or consider that issue.

6 (End of video clip.)

7 Q. (By Mr. Friel) Now --

8 A. Just to be clear, that's not a complete  
9 answer. There was a discussion that follows that. I  
10 think you're --

11 MS. CANDIDO: Your Honor, if I may, for  
12 optional completeness?

13 THE COURT: Excuse me?

14 MS. CANDIDO: May I read additional  
15 testimony for optional completeness?

16 THE COURT: Yes, you may.

17 MS. CANDIDO: This is Page 58 from Line  
18 17 through Page 59, Line 3.

19 MR. FRIEL: Your Honor, I'll allow the  
20 next question to be read, but this should be done on  
21 Counsel's own time as a matter of redirect.

22 THE COURT: All right. You may go ahead.

23 QUESTION: What are the benefits of a  
24 blade server over a rack server?

25 ANSWER: Again, I would say the same

1 answer. I think they can all be used for similar  
2 studies. They all provide many similar functionalities.

3 There can be differences that maybe for a  
4 particular customer, may be more consistent with their  
5 past practices or existing structure or the environment  
6 in which they plan to store it or perhaps the use they  
7 plan to make of it; but I don't have particular  
8 engineering knowledge to do that kind of comparison.

9 MR. FRIEL: Thank you.

10 Q. (By Mr. Friel) You recite in your report that  
11 tower servers are alternatives to blade servers, right?

12 A. Yes, again, based on conversations with  
13 others.

14 Q. And similarly, you didn't talk to any IBM  
15 customers directly to determine whether -- or why they  
16 would purchase a blade server instead of a tower?

17 A. Correct.

18 Q. Or a tower server instead of a blade?

19 A. Correct.

20 Q. Or you didn't talk to a single IBM customer  
21 directly as to whether they considered tower servers to  
22 be acceptable alternatives to blade servers?

23 A. Same answer as before. Again, I wouldn't  
24 understand a customer answering a question in that  
25 context.

1 Q. And at the time you wrote your report, you  
2 didn't have any information on the benefits of a blade  
3 server over a tower server; is that correct?

4 A. Being consistent with both the clip you just  
5 played and the further testimony, that's my knowledge.

6 Q. Well, I'm not sure I understand your question  
7 (sic). Can you answer yes or no?

8 A. I don't think it's a yes or no question.  
9 My belief is, it's one of those loaded questions where  
10 you've made an assumption that there are benefits and  
11 advantages; and in fact, I'm not aware that there are  
12 unique benefits and advantages. Rather, they provide  
13 the same benefits and advantages, but someone's  
14 particular context where they might need this storage  
15 capability may differ, and that may cause an initial  
16 preference for a blade.

17 Q. Okay. That's your answer now.

18 MR. FRIEL: Can we play --

19 A. That was in the depo as well, if you look at  
20 it.

21 MR. FRIEL: Let's play Page 59 starting  
22 at Line 8 and going to Page 60, Line 9.

23 (Video playing.)

24 QUESTION: What are the benefits of a  
25 blade server over a tower server?

1                   ANSWER: I don't know. Again, the focus  
2 of my answer is on technical engineering capabilities.

3                   QUESTION: But when you formed your  
4 opinion in this case, you didn't have in mind the  
5 benefits of a blade server over a tower server?

6                   ANSWER: Actual benefits, no. Initial  
7 perceived benefits, I described to you my general  
8 understanding.

9                   QUESTION: And when you formed your  
10 opinion in this case, you didn't have in mind the  
11 benefits of a blade server over a rack server?

12                   ANSWER: Other than the general benefits  
13 that were initially perceived, no.

14                   (End of video clip.)

15           Q.     (By Mr. Friel) All right.

16           A.     I agree -- I agree with that answer.

17           Q.     Thank you.

18                   You -- in your opinion, you assume that  
19 Dr. Chu's inventions, the inventions of the  
20 patents-in-suit are a minor improvement over the prior  
21 art; is that correct?

22           A.     Again, I relied on the conversations with  
23 technical experts for that conclusion.

24           Q.     So you assumed that conclusion, right?

25           A.     I guess you can call it an assumption; but

1 when it's an opinion of another expert, I don't really  
2 consider that an assumption.

3 Q. Thank you.

4 Now, you didn't do anything to test that  
5 opinion or assumption, did you?

6 For instance, you didn't interview any IBM  
7 blade server customers about the importance of Dr. Chu's  
8 inventions?

9 A. It wouldn't be my field. That sounds like a  
10 technical field to me.

11 Q. Okay. So you didn't talk to any IBM customers  
12 about the importance of any aspects of Dr. Chu's  
13 inventions at issue in the case, right?

14 A. Yes. I wouldn't do that, no.

15 Q. Okay. Now, you're working for IBM in this  
16 case. We all know that, right?

17 A. I was retained by IBM, but I'm here to provide  
18 my own independent opinion.

19 Q. Okay. Is that a yes then?

20 A. No, that's a no, based on the way you phrased  
21 the question.

22 Q. All right. Is IBM paying your bills?

23 A. They are.

24 Q. Okay. And you bill at \$600 an hour; is that  
25 correct?

1 A. My current rate is 595 an hour.

2 Q. Okay. And how much of IBM's money have you  
3 spent so far?

4 A. What are the total bills in the case?

5 Q. Yes.

6 A. Since last summer, it's probably in the  
7 neighborhood of 4 -- \$450,000, something like that, for  
8 me and those employees working under my direction and  
9 control.

10 Q. Okay. And in addition to the 450,000, I  
11 assume you have some unbilled time and expenses?

12 A. Just this stub period of time before trial.

13 Q. And what period of time would that cover?

14 A. Just the last couple of weeks.

15 Q. And what would you estimate your billings will  
16 be to IBM for that period?

17 A. Another 40, 50 hours of my time, so 20,  
18 \$25,000.

19 Q. All right. So IBM has blade server customers,  
20 right? In fact, it's got lots of them.

21 A. Yes. In other words, you're saying it sells  
22 blades to customers, yes.

23 Q. Okay. And you didn't interview any one of  
24 them to form your opinions?

25 A. No, I did not.

1 Q. All right. Now, you used the Georgia-Pacific  
2 Factors in writing your reports. We saw that, the  
3 15-factor test, right?

4 A. Yes.

5 Q. And you considered every factor, right?

6 A. Yes.

7 Q. And Factor 9, you're familiar with the utility  
8 and advantages of the patented property over the old  
9 modes or devices, if any, that have been used for  
10 working out similar results?

11 A. Yes.

12 Q. All right. And you considered that factor in  
13 writing your opinion?

14 A. I did.

15 Q. And you considered previously existing  
16 technology?

17 A. Again, I asked about previously existing  
18 technology and conferred with the technical experts  
19 about that.

20 Q. Okay. So you considered the old mode of  
21 parallel PCI; is that right?

22 A. I knew of that.

23 Q. And you considered the advantages of the  
24 improvements that Dr. Chu made over the previously  
25 existing technology; is that right?

1           A.     Based on my discussions with the technical  
2 experts, I understand -- I tried to understand what  
3 benefits were being claimed.

4           Q.     And you, of course, wanted to know all of the  
5 benefits that were being claimed or that resulted from  
6 the claims, right?

7           A.     Again, I would have tried to understand that,  
8 based on the claimed contentions that were made and the  
9 explanations provided to me by the technical experts.

10          Q.     Okay. You didn't consider any advantages  
11 around computing density that blade servers may offer  
12 over racks, did you, in your report?

13          A.     I don't recall considering that as a  
14 standalone. My knowledge was focused on what components  
15 of the product were the ones most directly related to  
16 the claimed incremental invention. I understood these  
17 other benefits, including what you just asked about,  
18 would come from the combination of the prior art and the  
19 claimed invention, not just the claimed invention alone.

20          Q.     Okay. You were asked a question about this in  
21 your deposition, also, weren't you?

22          A.     Yes.

23          Q.     Do you recall that?

24          A.     I think I said I did not consider that as a  
25 standalone item. I didn't know anything about it as a

1 standalone item.

2 Q. Thank you.

3 So in writing your report, you -- in addition  
4 to not considering the computing density advantage, you  
5 didn't consider whether there were computing power  
6 advantages, in other words, lowered power usage?

7 A. Not as a standalone item apart from how the  
8 parts function together.

9 Q. And you didn't consider power savings as an  
10 advantage of blades over racks?

11 A. Again, same answer.

12 Q. And the same answer with respect to cooling  
13 benefits, not considered?

14 A. Correct.

15 Q. And you didn't consider the advantage of lower  
16 setup costs for blades over racks because you don't have  
17 to pay for each of the cables to be connected, right?

18 A. I was aware of that from some analyses that  
19 were done in the case. As you added more blades, the  
20 cost went down. So I was generally aware of that.

21 But, again, the invention, as I understood it,  
22 was not of blades; it was not of modular computing; it  
23 was of something that purportedly provided some  
24 advantages or improvements over that.

25 Q. The answer --

1 A. And so I didn't consider it as standalone.

2 Q. Okay. The answer to my question is, no, you  
3 didn't consider it?

4 A. Not as a standalone.

5 Q. Well, let's play your deposition then at Page  
6 98, Lines 17 through 20.

7 (Video playing.)

8 QUESTION: And in forming your opinions  
9 in this case, did you consider any of the setup costs  
10 that could be saved by using blade servers over rack  
11 servers?

12 ANSWER: No.

13 (End of video clip.)

14 Q. (By Mr. Friel) In writing your reports, did  
15 you consider any of the lower maintenance cost that  
16 could be achieved using blade servers over racks?

17 A. Again, the same as the others. Not as a  
18 standalone consideration.

19 Q. That's no, right?

20 A. Correct.

21 Q. And you didn't consider, in writing your  
22 reports, the space savings offered by blade servers  
23 compared to rack servers; is that correct?

24 A. Same answer.

25 Q. No?

1 A. Correct.

2 Q. In writing your reports, you didn't consider  
3 cable reduction advantages offered by blade servers over  
4 tower servers, right?

5 A. Same answer again. No, not as a standalone.

6 Q. Okay. And that's true for the other benefits  
7 that blades offered over towers, such as density  
8 advantages, computer power advantages, power savings,  
9 cooling, and lower setup costs; is that correct?

10 A. Again, yes, based on my understanding of the  
11 difference between the incremental invention as opposed  
12 to the product as a whole. I did not consider that  
13 standalone, no.

14 Q. So the answer is no?

15 A. I just said that.

16 Q. So Factor 9 we've talked about some. And you  
17 did consider that, right?

18 A. Yes.

19 Q. And you did not form any independent opinions  
20 about what type of modular computer systems existed  
21 before Dr. Chu's inventions and contribution to the art.

22 A. Again, I didn't. I relied on other experts  
23 for that.

24 Q. Okay. So let me ask you a little bit more  
25 about your background.

1                   So you said that you went to SMU Law, right?

2           A.     Yes.

3           Q.     And you clerked for a judge for a couple of  
4     years --

5           A.     Yes.

6           Q.     -- is that right?

7                   And then you were with a law firm, Weil  
8     Gotshal in Houston --

9           A.     Yes.

10          Q.     -- for about six years; is that right?

11          A.     Yes.

12          Q.     And that's a New-York-based law firm?

13          A.     Yes. I was in the Houston office.

14          Q.     Okay. And you worked in patent litigation,  
15     right?

16          A.     I worked in commercial litigation, which  
17     included at that time IP, including patents.

18          Q.     Okay. And you were not a partner at Weil  
19     Gotshal; is that right?

20          A.     That's correct.

21          Q.     You were an associate attorney?

22          A.     That's correct.

23          Q.     All right. And you never were made a partner  
24     at Weil Gotshal; is that right?

25          A.     I left before I was up for partner, that's

1 correct.

2 Q. Okay. And your work as an associate was,  
3 naturally, supervised by a partner at Weil Gotshal; is  
4 that right?

5 A. It was. I did have clients in cases of my  
6 own.

7 Q. Now, have you ever been a lead negotiator on a  
8 patent licensing negotiation while you were at Ernst &  
9 Young?

10 A. Yes.

11 Q. You were the lead negotiator?

12 A. Yes.

13 Q. All right. Let me take a look here.

14 MR. FRIEL: Can we play from your  
15 deposition Page 22, Lines 14 through 21?

16 (Video playing.)

17 QUESTION: Would you have considered  
18 yourself lead negotiator for any of these patent  
19 licenses when you were at Ernst & Young?

20 ANSWER: I think I would have been  
21 deferential and acknowledged that the -- either general  
22 counsel or chief IP counsel who I was working for was,  
23 in fact, the lead negotiator. Then they would have had  
24 outside counsel and me as well. So we were the  
25 negotiating team, but I would not presume to label

1 myself as the lead.

2 (End of video clip.)

3 Q. (By Mr. Friel) And at IntaCap, would you give  
4 the same answer with respect to not being the lead?

5 A. I would. So I played the role, but I was  
6 subject to my client's final decisions.

7 Q. And at StoneTurn, isn't it true that you've  
8 never been a lead negotiator in a patent licensing  
9 negotiation?

10 A. Again, the same context. I was always  
11 deferring to my client for final decisions, but I would  
12 do the negotiating.

13 Q. So I want to make sure that I understand why  
14 you're here.

15 You're here to give an opinion on how IBM and  
16 Dr. Chu would have acted during a hypothetical  
17 negotiation in 2008, right?

18 A. Yes.

19 Q. But you've never actually led a patent  
20 negotiation yourself; you've always deferred to others  
21 and wouldn't presume to be the lead, right?

22 A. If you want to interpret it that way, that's  
23 fine.

24 Q. All right. And you don't have an engineering  
25 degree?

1 A. Correct.

2 Q. And you spent half your professional life  
3 working as a lawyer?

4 A. I've been a CPA for 25 years, and I practiced  
5 law for about 7 years.

6 Q. And you didn't talk to a single IBM customer  
7 before writing your opinion as to the desirability of  
8 the features or benefits enabled by the inventions  
9 Dr. Chu gave the world.

10 A. No.

11 Q. Thank you.

12 MR. FRIEL: Pass the witness.

13 THE COURT: Redirect?

14 MS. CANDIDO: Ryan, would you put up DX  
15 Demo 1608?

16 REDIRECT EXAMINATION

17 BY MS. CANDIDO:

18 Q. Mr. Ratliff, what does this slide tell you  
19 about the preferences of IBM's customers, in terms of  
20 the types of servers that they prefer?

21 A. 96 to 98 percent of what their customers  
22 purchase are racks, towers, and non-accused blades.

23 Q. So this shows that in 2008 to 2009, a  
24 majority -- significant majority of IBM server customers  
25 perceived there to be advantages of rack and tower

1 servers over blade servers; is that right?

2 A. Yes.

3 Q. Mr. Friel asked you about some licensing  
4 negotiations and whether you were the lead negotiator or  
5 you deferred to the client.

6 At the risk of sort of letting false modesty  
7 pollute your answer, could you explain what you meant by  
8 deferring to the client?

9 A. Yes. Both as a lawyer and as a consultant, I  
10 was retained by companies or individuals who owned the  
11 intellectual property or who were being asked to license  
12 the intellectual property. In that role, I am helping  
13 them achieve an objective.

14 In contrast perhaps to Mr. Yost here with IBM,  
15 who, as the client, would be the one negotiating and  
16 working out the solution, he could also hire someone  
17 like me to help them to do the negotiating. But at the  
18 end of the day, they're the ones that are going to be  
19 paying or granting the rights, and it's ultimately their  
20 decision.

21 So my view would be that I am ultimately  
22 subordinate to the ultimate client's interest; but I, in  
23 fact, did negotiate, reach agreements, provide my client  
24 with where we were, and they would make the decision to  
25 accept it or reject it.

1 Q. You were at the heart of dozens of patent  
2 license negotiations --

3 A. Yes.

4 Q. -- is that fair?

5 Have you seen evidence -- any evidence in this  
6 case that adjusted for time and market share that IBM  
7 should be required to pay over 12 times as much as HP  
8 paid for a license to the ACQIS patents?

9 A. No.

10 Q. Have you seen any evidence in this case that  
11 supports a 3 percent reasonable royalty for the three  
12 ACQIS continuation patents asserted against IBM in this  
13 case?

14 A. No.

15 Q. Would ACQIS's damages demand of a 3 percent  
16 running royalty leave IBM a reasonable profit on the  
17 blade servers?

18 A. No. As I said earlier, they're already losing  
19 about a hundred thousand dollars on every million  
20 dollars of blade servers they're selling.

21 Q. So have you seen any evidence in this case  
22 that supports a royalty to ACQIS of \$27 million for less  
23 than a three-year license from IBM?

24 A. No.

25 Q. So if all of IBM's accused products were found

1 to infringe and ACQIS's patents were found to be valid,  
2 contrary to IBM's view, in your opinion, what is the  
3 maximum reasonable royalty that the jury should award?

4 A. \$3.5 million.

5 Q. Thank you.

6 THE COURT: All right. Any further  
7 examination of this witness?

8 MR. FRIEL: No, Your Honor.

9 THE COURT: All right. Very well. You  
10 may step down.

11 THE WITNESS: Thank you, Your Honor.

12 THE COURT: All right, Ladies and  
13 Gentlemen of the Jury, we're going to take our afternoon  
14 break at this time. We'll be in break -- on break until  
15 2:45. Be in recess.

16 COURT SECURITY OFFICER: All rise.

17 (Jury out.)

18 (Recess.)

19 COURT SECURITY OFFICER: All rise.

20 (Jury in.)

21 THE COURT: Please be seated.

22 All right, Counsel. You may proceed.

23 MR. BROGAN: Your Honor, we would call  
24 Mr. Thomas Gafford.

25 THE COURT: All right. Mr. Gafford?

1 MR. VERHOEVEN: Your Honor, for the  
2 record, should I announce that we've rested?

3 THE COURT: That would be very nice.  
4 Thank you.

5 MR. VERHOEVEN: Okay. IBM rests, Your  
6 Honor.

7 THE COURT: You rest. Very good.

8 This will be the rebuttal, Plaintiff's  
9 rebuttal case, and then the testimony will be over,  
10 so...

11 THOMAS GAFFORD, PLAINTIFF'S WITNESS, PREVIOUSLY SWORN  
12 DIRECT EXAMINATION

13 BY MR. BROGAN:

14 Q. Mr. Gafford, welcome back.

15 A. Thank you.

16 Q. Now, we talked a little bit about claim  
17 construction in this case. You're familiar with the  
18 Court's claim constructions, right?

19 A. I am.

20 Q. Okay. And did you use those -- well, we  
21 talked about the first three constructions, the  
22 construction for console, computer module, and slot.

23 Did you have the Court's constructions of  
24 those before you prepared your expert report?

25 A. I did, and I used them.

1 Q. And you used them.

2 Now, with respect to other terms at the time  
3 that were not construed by the Court, what did you do?

4 A. I used the plain and ordinary meaning in the  
5 art of those terms.

6 Q. And is it your understanding that Drs. Conte  
7 and McClure did the same?

8 A. That's my understanding.

9 Q. How do you know that?

10 A. I read their reports, and they say so.

11 Q. Do you know where in Dr. McClure's report it  
12 says so?

13 A. Couldn't give you a memory test on what  
14 paragraph.

15 MR. BROGAN: Can you put up Paragraph  
16 197, please?

17 Q. (By Mr. Brogan) Is this the paragraph that  
18 you're referring to?

19 A. Yes, it is.

20 Q. Does that indicate that, like you, he applied  
21 the plain and ordinary meaning?

22 A. Yes, it does.

23 Q. And did you-all apply the plain and ordinary  
24 meaning as that meaning would be to a person of ordinary  
25 skill in the art?

1 A. Yes.

2 Q. Do you have an opinion on what the person of  
3 ordinary skill in the art would be like?

4 A. Yes. That's a person with a Bachelor of  
5 Science Degree in electrical engineering and three to  
6 five years of industry experience.

7 Q. And despite applying the level of ordinary  
8 skill in the art, did you agree with Mr. -- Dr. McClure  
9 and Dr. Conte in each instance?

10 A. At the level of skill or --

11 Q. The application of the claim terms.

12 A. Having applied the level of skill, no. We  
13 certainly don't agree on what that means, on what some  
14 of these terms mean.

15 Q. Okay.

16 MR. BROGAN: Would you please go back to  
17 the claim construction?

18 Q. (By Mr. Brogan) Now, the term PCI bus  
19 transaction, the Court's construed that term, right?

20 A. Yes.

21 Q. Would you please explain for the jury why PCI  
22 bus transactions, as construed by the Court, do not  
23 appear in ethernet transmissions?

24 A. The basic reason is that ethernet is utterly  
25 incapable of carrying such a transaction. The -- you

1 get that from a look at the first page of the PCI spec  
2 and the first page of the standards document for  
3 ethernet.

4 The key phrase here is interconnected  
5 peripheral component. PCI is a master slave system. An  
6 interconnected component is something that it directly  
7 controls. It has to have the ability to have that  
8 device jump to its bidding whenever it sends a command  
9 out.

10 If you substitute between the CPU and one of  
11 these interconnected components, that is, for the most  
12 part, found on the blade itself, if you substitute  
13 ethernet for that connection, you prevent -- the  
14 component is no longer interconnected. You have  
15 prevented the CPU from having the control it requires to  
16 do the job of sending out a PCI bus transaction.

17 Q. Using Dr. Chu's drawings, could you illustrate  
18 that for the jury?

19 A. Yes.

20 THE WITNESS: If I can get up?

21 THE COURT: Yes, you may.

22 Q. (By Mr. Brogan) And while doing so, can you  
23 identify the interconnected peripheral components?

24 A. Yes. For the old computer, the inter -- the  
25 interconnected components are the northbridge, the -- a

1 couple of input/output devices shown here as in/out, and  
2 the southbridge and the ethernet controller.

3 For the new computer, again, the  
4 interconnected components are the northbridge, the --  
5 one of these controllers, the PCI A controller, the PCI  
6 B controller, the southbridge, and the -- pardon me --  
7 the ethernet controller over here on the side. These  
8 are all interconnected components.

9 Q. Are the interconnected peripheral components  
10 of one computer also the interconnected peripheral  
11 components of another computer?

12 A. No. They cannot be. That's why you use  
13 ethernet here instead of using a PCI connection.  
14 Ethernet is a peer-to-peer connection. It is meant to  
15 connect lots of computers over distances up to thousands  
16 of feet, and they all have the same rank as each other.  
17 There are no masters and slaves.

18 That's appropriate for a connection among the  
19 computers. It is inappropriate for the connection in  
20 here (indicates).

21 Q. Now, does this explain why Drs. McClure and  
22 Conte couldn't find those PCI address bits that I was  
23 asking about?

24 A. On ethernet, yes. They can't be carried.

25 Q. Would you explain what those address bits are

1 and why they don't appear on ethernet?

2 A. The address bits are the -- the way the  
3 processor decides which of these interconnected  
4 components it's going to communicate with, and they are  
5 sent out at the beginning of a command over PCI, from  
6 the processor, whether it's conventional PCI or PCI  
7 Express, and they're how the processor determines which  
8 device to talk to, after which the data is exchanged.

9 Q. And do those same address bits show up in the  
10 ethernet packets?

11 A. No. There is no mechanism in ethernet for  
12 sending those address bits out over the network.

13 Q. Now, with respect to the prior art that's been  
14 identified in this case, have you seen any prior art  
15 that uses ethernet to connect a northbridge and a  
16 southbridge?

17 A. No, it's not done, and it wouldn't be done.

18 Q. Have you seen any prior art that has ethernet  
19 coupled directly to a northbridge?

20 A. No.

21 Q. What would happen if you replaced the PCI bus  
22 in the old computer with ethernet?

23 A. You would break it. You wouldn't have a  
24 working machine anymore.

25 Q. Why not?

1           A.     Because -- because an ethernet would not  
2     permit the processor to exert the control it needs to  
3     make this system work. And in the terms of the Court's  
4     construction, any device on the other side of ethernet,  
5     such as if you put ethernet between the northbridge and  
6     the southbridge, the southbridge would cease to be an  
7     interconnected peripheral component.

8           Q.     You've heard bottlenecks discussed in this  
9     case. Would using ethernet between the northbridge and  
10    southbridge create bottlenecks?

11          A.     If you could even make it work, it would be a  
12    monstrous bottleneck.

13          Q.     Is it fair to say that you agree with  
14    Dr. Conte's opinion expressed in his report that  
15    ethernet does not serial encode PCI bus transactions?

16          A.     Yes.

17          Q.     Would you explain that for the jury?

18          A.     Ethernet has the ability to encode data for  
19    moving to another computer as a peer in a conversation.  
20    That's all it has the ability to do.

21                 The address part of a PCI transaction stops at  
22    this edge, the interface edge of an ethernet controller.  
23    It's merely used by the processor to decide to talk to  
24    this interface instead of this interface. It's not  
25    meant for and it does not get transmitted over the

1 network.

2 Q. In this case, if ethernet doesn't carry PCI  
3 bus transactions, can there be anticipation of the  
4 asserted claims?

5 A. No.

6 Q. Why not?

7 A. Because if you don't have that element, you  
8 don't have anticipation. And that element is in every  
9 asserted claim.

10 Q. Thank you, Dr. Gafford -- or Mr. Gafford.  
11 Sorry. Like I say, I keep upgrading you.

12 A. (Witness seated.)

13 Q. Now, you talked a little bit about obviousness  
14 in this case. Would you explain for the jury why, in  
15 your opinion, it would not be obvious to combine the  
16 Hong reference with any of the RLX, Ketris, or  
17 QuantumNet references?

18 A. Sure. In order for a combination to be  
19 obvious and to avoid the hindsight problem of looking at  
20 a claim and then saying, all I have do is use that as a  
21 shopping list to go find things in the prior art, the  
22 idea of -- or the prospect of combining two things has  
23 to look like a good idea to an engineer at the time.

24 And the problem with Hong is that when you add  
25 it to any of these blades, you get a poorer blade as a

1 result.

2 Q. You say you get a poorer blade as a result.  
3 What do you mean?

4 A. Well, these blades are designed -- if I can  
5 just grab one of these for a minute.

6 These blades are designed very compactly.  
7 There's no spare room on here. There's no spare heat to  
8 give away, and there's no spare power to give -- to  
9 apply. It's not going to do you any good. These are  
10 the kinds of decisions engineers make in the course of  
11 doing their job every day.

12 So what Hong does is to take you from, let's  
13 say, the PCI conventional bus coming out of the  
14 northbridge, and using the Hong circuit would serialize  
15 it, and then using the rest of the Hong circuit would  
16 de-serialize it, and then connect it to some other  
17 conventional PCI device on the board.

18 You still have the bottleneck in the PCI. You  
19 don't add something to a chain of equipment and make it  
20 faster. The most you could do is not affect it at all.  
21 In fact, Hong slows it down a little.

22 And it costs power, it costs space on the  
23 board to mount the thing, and you have to buy the  
24 silicon. You have to buy the part to perform the Hong  
25 function. There's simply no reason to put it on.

1 Q. And do the claims in this case call out a  
2 traditional parallel PCI bus?

3 A. No, they do not.

4 Q. And does Dr. Chu's invention provide any  
5 advantages over what would be the use of Hong in a blade  
6 server?

7 A. Yes.

8 Q. Could you explain what those are, for the  
9 jury?

10 A. Dr. Chu, through his Figure 8, shows a way to  
11 connect this serialized encoded PCI bus directly to a  
12 northbridge and southbridge and remove the bottleneck  
13 and provide for an easily scalable length for the  
14 future.

15 Q. And in Figure 8, is there an interface  
16 controller in Figure 8?

17 A. It is part of the northbridge. It's no longer  
18 a separate thing and is no longer a requirement for a  
19 parallel PCI bus in that figure.

20 Q. And in your view, is that the interface  
21 controller that's called out in the claims?

22 A. Yes.

23 Q. And in your view, is that interface controller  
24 different from an ethernet controller?

25 A. Yes, completely, because it's sending, as I

1 said before, PCI transactions, and it's sending them to  
2 interconnected peripheral components, such as the  
3 southbridge in his Figure 8, which is something ethernet  
4 cannot do.

5 Q. Now, are you familiar with the term secondary  
6 indicia of non-obviousness? I know it's a mouthful.

7 A. Yes.

8 Q. Can you explain what that is to the jury?

9 A. Secondary indicia of non-obviousness are ways  
10 to take another look at the -- an obviousness case to  
11 see whether it really would have been obvious to combine  
12 the references that someone -- in this case, IBM, for  
13 every one of ACQIS's asserted claims -- says would be  
14 obvious to combine, because it applies typically  
15 non-technical information to the analysis.

16 Q. Why is real-world proof important to consider  
17 when determining whether a patent claim is obvious?

18 A. It's a cross-check that helps avoid the  
19 hindsight reconstruction danger in any obviousness. You  
20 can't -- you can't not look at the claim again once  
21 you've read the patent. So you have to be carefully  
22 disciplined in not using that as a guide to what to pick  
23 in the prior art.

24 Q. Can you provide the jury with some examples of  
25 the real-world proof that you've been talking about?

1           A.     Yes.   Evidence such as skepticism by others  
2     that the invention was even a good idea or that should  
3     have been made, commercial success, and the taking of  
4     licenses by others to the patented inventions.

5           Q.     You mentioned licensing by others.   Did you  
6     find any evidence of that in this case?

7           A.     Yes.

8           Q.     Let me back up here just a second.

9                   Is secondary indicia of non-obviousness always  
10    relevant to an obviousness analysis?

11          A.     Yes.

12          Q.     Is it mandated?

13          A.     Yeah, I believe so.

14          Q.     Does the secondary indicia of non-obviousness  
15    need to be tied to the claimed invention in any way?

16          A.     Yes, it does.

17          Q.     In fact, can you explain why that is?

18          A.     Well, you need to distinguish the things such  
19    as commercial success from being a result of great  
20    salesmanship as compared to the features of the claimed  
21    invention.

22          Q.     And now we sort of get back on line here.  
23    Did you find any real-world proof indicating that  
24    ACQIS's asserted patent claims are not obvious?

25          A.     Yes.

1 Q. What did you find?

2 A. Well, to start with, the skepticism. The IBM  
3 BladeCenter paper has several incidents in it, several  
4 places in it where they report -- the authors, including  
5 Mr. Hong, report that people, at the time this project  
6 was being proposed, were skeptical that it was a good  
7 idea to make.

8 Q. And when you say skeptical, what do you mean?

9 A. They thought in some cases -- the cases that I  
10 think I can remember that -- I'm picturing the three  
11 places I highlighted on that page, and I'm drawing a  
12 complete blank as to what they say. I'm sorry.

13 They basically had to do with whether it would  
14 be ever a good idea to build this thing instead of keep  
15 making what they were making, which were things like  
16 racks and towers.

17 Q. How about licensing? Did you find any  
18 evidence of licensing that's relevant in this case?

19 A. Yes.

20 Q. What did you find?

21 A. Just about everybody in this business has  
22 taken a license to these claims.

23 Q. At what percentage of the market in your view?

24 A. I think we're up to everyone's part. I don't  
25 remember the number now, but --

1 MR. VERHOEVEN: Objection, Your Honor.

2 May we approach?

3 THE COURT: Yes, you may.

4 (Bench conference.)

5 MR. VERHOEVEN: This is a technical  
6 witness. What market share of the folks that have taken  
7 litigation licenses out of total market is there? And I  
8 don't think that's in his report anywhere. He has no --  
9 any expertise to talk about financial issues. They're  
10 just trying to -- what they're doing --

11 MR. BROGAN: I withdraw the question.

12 THE COURT: Okay.

13 (Bench conference concluded.)

14 MR. BROGAN: Sometimes I get a little  
15 carried away. I'm going to withdraw that question.

16 Q. (By Mr. Brogan) A number of licenses have been  
17 issued by ACQIS to others.

18 A. Yes, as we've heard.

19 Q. Do you have an understanding of whether those  
20 licenses were issued because the products those  
21 companies are selling are covered by ACQIS's claims?

22 A. As far as I know, they all were.

23 Q. Do you believe that to be the case?

24 A. Yes. I've analyzed the products from those  
25 licensees, and they practice the claims.

1 Q. So we've covered licensing by others and  
2 skepticism by others.

3 Have you seen any evidence of Dr. Chu's  
4 invention solving a long-felt need in the marketplace?

5 A. Yes. It has made some major contribution to  
6 the thing that people most like about blades, which is  
7 keeping -- giving a lot of compute power in a very  
8 compact, trouble-free package.

9 Q. And do you have any evidence that Dr. Chu's  
10 invention has done that?

11 A. Yes.

12 Q. What's that evidence?

13 A. Well, the evidence is -- the evidence includes  
14 the fact that the -- the way IBM -- the way everybody in  
15 this business pitches these blades is the space-saving,  
16 the power-saving, the amount of computer you get for  
17 your dollar.

18 Q. Does the Dell white paper impact the long-felt  
19 need?

20 A. The Dell white paper is a very great example  
21 of Dell stating those very things as advantages.

22 Q. And is there a nexus between Dr. Chu's claimed  
23 invention and that long-felt need?

24 A. Yes, absolutely. The Dell paper talks about  
25 these kinds of advantages that you get from these

1 claimed elements.

2 Q. Does it talk about the prior bottlenecks of  
3 PCI?

4 A. Yes. PCI Express being one of them. Not the  
5 only one, but it focuses on that.

6 Q. Does it talk about the bottlenecks with PCI?

7 A. Absolutely.

8 Q. And does it show that PCI Express, the thing  
9 that Dr. Chu says is his serialized -- uses his  
10 serialized invention, does it show that as the solution?

11 A. Yes.

12 Q. Is that the solution that people knew about,  
13 you know, way back when in the late 1990s?

14 A. The bottleneck, no. That solution to the  
15 bottleneck was not something that anyone had at hand  
16 before Dr. Chu's patents.

17 Q. Did they know about the problem, the  
18 bottleneck, back in the late 1990s?

19 A. Some of them could see it coming; and the  
20 things we've heard about Band-Aid buses, like AGP and so  
21 on, were an example of them seeing this problem coming,  
22 but they hadn't come up with that solution.

23 Q. I'm just going to ask you one more question.  
24 With all the things you've seen in this courtroom and  
25 all the things you've heard, do you still think that Dr.

1 Chu's invention is a big deal?

2 A. I do.

3 MR. BROGAN: Thank you.

4 THE COURT: All right. Cross-exam?

5 MR. VERHOEVEN: May we approach very  
6 briefly, Your Honor?

7 THE COURT: All right. Counsel?

8 MR. BROGAN: I'm sorry.

9 (Bench conference.)

10 MR. VERHOEVEN: I just wanted to check  
11 the clock and also see if you still want -- or you guys  
12 are still intending -- well, first, what's the clock?

13 MR. BROGAN: I was just told I've got 7  
14 minutes.

15 MR. VERHOEVEN: Okay.

16 MR. BROGAN: So I don't know what you  
17 were doing, but --

18 MR. VERHOEVEN: Well, I just -- we need  
19 to know if we need to reserve for willfulness. Can you  
20 tell us at this point?

21 MR. BROGAN: Reserve like 2 or 3 minutes.  
22 I don't -- I've got 7. I don't have a whole lot of  
23 time.

24 MR. VERHOEVEN: Can't you just tell me?  
25 Are you going to use those 7 or not?

1 MR. BROGAN: I don't know. That took  
2 longer than I thought it would. I mean, I'll save 2 and  
3 you save 2.

4 MR. VERHOEVEN: I just want to know if I  
5 should reserve, and I can't tell if he won't tell me  
6 whether he's going to put on a willfulness case.

7 THE COURT: Well, he'll make a decision.  
8 I don't think he's got much time for that, but...

9 MR. VERHOEVEN: All right, Your Honor.  
10 Thank you.

11 (Bench conference concluded.)

12 CROSS-EXAMINATION

13 BY MR. VERHOEVEN:

14 Q. Good afternoon, Mr. Gafford.

15 A. Good afternoon, Mr. Verhoeven.

16 Q. Let me start by putting up a demonstrative  
17 slide, DX Demo 1009, and this is just a graphic that  
18 we've created. And I'm going to go over here next to  
19 this monitor so that I can point to things.

20 This is a graphic we've created of a computer,  
21 the CPU, a northbridge, an ethernet interface  
22 controller.

23 You see that, sir?

24 A. Yes.

25 Q. And then below that, in the second box, we

1 have a printer, which is a peripheral device, right?

2 Are printers peripheral devices sometimes?

3 A. In the sense -- as a ethernet connection, no,  
4 it's not a peripheral device. It's just another node on  
5 the network.

6 Q. So a printer, in your view, is not a  
7 peripheral device?

8 A. Not in this kind of connection, no, it's not.

9 Q. Okay. What about keyboard? A keyboard with  
10 an ethernet connection, that's not a peripheral device  
11 in your opinion?

12 A. It's not an interconnected peripheral  
13 component if it's connected by ethernet.

14 Q. Well, my question is just whether it's a  
15 peripheral device. You know what it means to say  
16 something is a peripheral device.

17 A. Well, yes. Merriam-Webster gives us that  
18 peripheral is on the outer -- outskirts of something.

19 In this case, this printer and a keyboard  
20 interface connected by an ethernet is certainly on the  
21 outskirts of the entire computer system.

22 Q. So generally speaking, setting -- let's get  
23 away from the claim language for a second. People of  
24 ordinary skill understand, when you're talking about  
25 peripheral devices to a computer, you're talking about

1 things like printers, keyboards, mouses, screens, right?

2 A. They are --

3 Q. Those are peripherals.

4 A. They are generally peripheral to an entire  
5 computer system, yes.

6 Q. Okay. But it's your opinion that a printer is  
7 not a peripheral device?

8 A. It is not -- you've got the claim language  
9 here as presided (sic) the Court. As defined by the  
10 Court, it is not an interconnected peripheral component.

11 Q. If I have a computer here in a box and I've  
12 got a printer in a separate box and I've got an ethernet  
13 cable -- you'll agree that's a serial data signal, an  
14 ethernet cable?

15 A. Yes, it is.

16 Q. Okay. And so this little squiggly line here  
17 is a serial data signal, correct?

18 A. Yes, it is.

19 Q. Okay. And it's interconnected between the  
20 printer and the computer, right?

21 A. It is.

22 Q. And that serial data signal permits the  
23 computer to communicate with the printer.

24 A. It does permit that, yes.

25 Q. Okay. So it's serial, it permits

1 communication, and the printer is interconnected with  
2 the computer, right?

3 A. In some sense other than the planet we're  
4 living on today, it might be; but not here, not in that  
5 sense, for the very good reason that interconnected  
6 peripheral component is something that comes right off  
7 of Page 1 of the PCI spec, which talks about PCI is used  
8 for highly integrated peripherals, such as ethernet  
9 controllers themselves, memory, and other types of  
10 peripheral devices on the board.

11 This doesn't meet that limitation. This  
12 doesn't meet -- it doesn't -- it doesn't meet that --  
13 the Court's definition in the sense of how one of  
14 ordinary skill would use this.

15 The idea of pitching ethernet as a substitute  
16 for PCI is -- I'm sorry, Counsel. It's nuts.

17 Q. This printer here is interconnected with the  
18 computer, right, sir?

19 A. It is interconnected.

20 Q. Thank you.

21 MR. VERHOEVEN: Go to the next slide.  
22 Not that one. The next one. Sorry.

23 Let's go to DX Demo 1011, please.

24 Q. (By Mr. Verhoeven) Okay. And this is another  
25 graphic that I've created, and you see that it's the

1 same basic scenario. It's got a computer in a box.

2 Do you see that, sir?

3 A. Yes.

4 Q. And then it's got a printer in a separate box.

5 Do you see that, sir?

6 A. Yes.

7 Q. And it's connected by a USB interface

8 controller with a wire between the two.

9 Do you see that?

10 A. I do see that.

11 Q. Tell the jury, what does USB stand for?

12 A. Universal serial bus.

13 Q. So that -- this would be -- this little  
14 squiggly line between the computer and the printer would  
15 be a serial data signal, correct?

16 A. It is a serial data signal, yes.

17 Q. And the printer here, by virtue of this  
18 squiggly line, is interconnected to the computer,  
19 correct?

20 A. Not in any sense of how the PCI bus operates,  
21 but there is an interconnection.

22 Q. A person of ordinary skill looking at this  
23 would say: Yeah, this is interconnected between the  
24 printer and the computer, right, sir?

25 A. You cannot deny that there is an

1 interconnection. It just isn't what the Court requires.

2 Q. Right. And printers are often thought of as  
3 peripheral components to computers, aren't they, sir?

4 A. In the sense, as I described before, that they  
5 live on the outskirts of the computer system, yes.

6 Q. Okay. So a person of ordinary skill looking  
7 at this and knowing that this is -- this little squiggly  
8 line here is a universal serial bus would understand  
9 that this thing here is a serial data communication  
10 between the computer and the printer, which is a  
11 peripheral component, correct?

12 A. Basically, no, because you -- your drawing  
13 here has got the imprimatur of the Court's construction  
14 on it, and it isn't that, and the difference is  
15 important.

16 Q. A printer is a peripheral component?

17 A. It is peripheral to the computer system.

18 Q. Okay.

19 A. It is not a peripheral --

20 Q. USB is a serial -- USB is a serial data  
21 signal, yes?

22 A. Yes, it is.

23 Q. And this scenario allows the CPU and the  
24 computer to communicate with the printer, right?

25 A. In some broad sense, but you will never find a

1 printer on this board. That's why this doesn't --

2 Q. Sir, I'm not -- I'm not asking you about that  
3 board. I'm asking you about what's on the screen.

4 A. I see what's on the screen.

5 Q. Okay. And a person of ordinary skill, looking  
6 at the screen, would understand that this squiggly line  
7 here being a USB serial bus between a USB interface  
8 controller and a USB interface controller is a serial  
9 data signal communication, right?

10 A. There's no doubt about that.

11 Q. And this squiggly line shows an  
12 interconnection between the computer and the printer,  
13 right?

14 A. Yes, sir. There's an interconnection between  
15 the printer --

16 Q. And the printer is a peripheral component --

17 MR. BROGAN: Excuse me. Can the witness  
18 be allowed to answer?

19 THE COURT: Please allow the witness to  
20 answer.

21 Q. (By Mr. Verhoeven) Is that right?

22 A. Well, it's -- let me make sure --

23 Q. The printer is -- is a printer a peripheral  
24 component, sir?

25 A. To a computer system, it is a peripheral

1 component.

2 Q. Okay.

3 MR. VERHOEVEN: Now let's go to DX Demo  
4 1013.

5 Q. (By Mr. Verhoeven) And here we have Claim 12,  
6 and we've got this -- I've pulled out the element here:  
7 Interface controller coupled to a differential signal  
8 channel for communicating an encoded serial bit stream  
9 of PCI bus transaction.

10 Do you see that, sir?

11 A. Yes.

12 Q. And you would agree with me that the  
13 highlighted-in-red phrase has been construed by the  
14 Court to mean a data signal communication with an  
15 interconnected peripheral component, yes?

16 A. Yes.

17 Q. And you would agree with me, wouldn't you,  
18 sir, that under the Court's claim construction order,  
19 the Court found that the phrase PCI bus transaction is  
20 not limited to be specific to a specific PCI protocol;  
21 isn't that true, sir?

22 A. In the sense -- as long as we understand that  
23 by protocol, you mean serial or parallel, yes.

24 MR. VERHOEVEN: Let's go to DX Demo 1015.

25 Q. (By Mr. Verhoeven) This is a depiction from

1 Figure 7 of the patent. We've looked at that before. I  
2 asked you about this when you testified the first time.

3 Do you remember that generally?

4 A. Yes.

5 Q. And then pulled out from Column 5, Lines 26  
6 through 28, an excerpt from the '415 patent  
7 specification, which appears in all three patents. And  
8 I'll just read it for the record.

9 It says: The present invention overcomes the  
10 aforementioned disadvantages of the prior art by  
11 interfacing two PCI or PCI-like buses using a non-PCI or  
12 non-PCI-like channel.

13 Do you see that?

14 A. Yes.

15 Q. And in Figure 7, the two PCI buses are the  
16 northbridge parallel bus and the secondary PCI bus.  
17 They're both parallel, right, sir?

18 A. They are.

19 Q. Okay. And those are the things that are  
20 interfaced using the patent's own description, using a  
21 non-PCI or non-PCI-like channel, right?

22 A. Yes. In this sense, the patent is talking  
23 about non-PCI, meaning non-parallel because it goes on  
24 to describe --

25 Q. Sir?

1           A.     You cannot read four words from the patent and  
2     ignore the balance of the four corners of the patent.

3                     And in context, this is referring to the fact  
4     that the -- what is going on over the serial interface  
5     is an encoded serial PCI transaction.

6                     When they say non-PCI in this context, in this  
7     part of the patent at Column 5, they're talking about  
8     it's non-PCI in the sense that it's not parallel.

9           Q.     It says, quote, using a non-PCI or  
10    non-PCI-like channel.

11                    Do you see that?

12           A.     Yes.

13           Q.     That's what it says, right?

14           A.     Yes, it does.

15           Q.     And that's referring to the little squiggly  
16    line here, right?

17           A.     The serial -- the squiggly line in this  
18    non-PCI channel is the serially encoded PCI disclosed  
19    elsewhere in this patent.

20           Q.     So this is -- this is not referring to the  
21    squiggly line, this phrase, non-PCI or non-PCI-like  
22    channels? That's not referring to this squiggly line?  
23    Is that what your testimony is?

24           A.     It is referring to that squiggly line.

25           Q.     Okay. It is.

1 MR. VERHOEVEN: Let's go to DX Demo 1016.

2 Q. (By Mr. Verhoeven) Now, what I've done on this  
3 slide, sir, is I've pulled out from your expert rebuttal  
4 report a statement that you have --

5 MR. VERHOEVEN: Do we have a paragraph  
6 from this?

7 Q. (By Mr. Verhoeven) I'll get to the paragraph  
8 in a second, sir.

9 It says, quote: I know from my experience  
10 that a transaction on the PCI bus is defined as, quote,  
11 an address phase followed by one or more data phases. I  
12 hereby incorporate by reference the PCI revision 2.2  
13 standard.

14 Do you see that?

15 A. Yes.

16 Q. You remember quoting that in your report?

17 A. I certainly do.

18 Q. So you defined this phrase PCI bus by  
19 incorporating information from the PCI protocol, didn't  
20 you, sir?

21 A. Yes.

22 Q. But the Court's construction below does not  
23 incorporate any reference to the PCI revision protocol  
24 at all. It just says: As such, the Court construes PCI  
25 bus transaction as a data signal communication with an

1 interconnected peripheral component, doesn't it, sir?

2 A. Before I answer that, let me -- that's part of  
3 my answer, but let me just be clear that what we're  
4 talking about here, in the sense of the Court's ruling  
5 and with the context the Court gave us, is that we're  
6 not stuck with the parallel protocol, but we are moving  
7 PCI information, and that's how the Court chose to  
8 describe that.

9 Q. For the record, this sentence, that comes out  
10 of Paragraph 269 of your rebuttal report, sir.

11 Isn't it true, sir, that you used a different  
12 definition for PCI bus transaction in your rebuttal  
13 report addressing validity than the Court used when it  
14 construed that phrase?

15 A. Yes.

16 MR. VERHOEVEN: Let's go to DX -- well,  
17 let's go to --

18 Q. (By Mr. Verhoeven) Let's change subjects.

19 MR. VERHOEVEN: Your Honor, may I  
20 approach the drawing here?

21 THE COURT: Yes, you may.

22 Q. (By Mr. Verhoeven) Now, you testified --

23 A. I'm not going to be able to see that.

24 Q. -- on direct examination -- is that better?

25 A. Yes.

1           Q.    You testified both on your first session where  
2    you brought in testimony on direct and also in this  
3    stage of the proceedings on direct about this picture  
4    here.   This says:   Computer old and computer new?

5           A.    Yes.

6           Q.    And this is a subject (sic) that Dr. Chu drew?

7           A.    Yes.

8           Q.    Okay.   And computer new is what he said his  
9    invention is?

10          A.    Yes.

11          Q.    Okay.   That's not -- that picture never  
12   appears in the patent, does it, sir?

13          A.    Right.

14          Q.    There's no picture of that in any of the  
15   illustrations in the patent, is there, sir?

16          A.    All that you find in the patent is the middle  
17   green line.   You don't find the extra green lines.

18          Q.    Can you show me where in this patent there's  
19   anything even remotely similar to this?

20          A.    Yes.   Figure 8.

21          Q.    All right.   Figure 8.

22                   MR. VERHOEVEN:   What's the exhibit  
23   number?

24                   One minute, Your Honor.

25                   THE COURT:   Yes.

1 MR. VERHOEVEN: Do you have Figure 8?

2 MR. POWELL: 259. DX259.

3 MR. VERHOEVEN: DX259.

4 Q. (By Mr. Verhoeven) Okay. Your testimony is  
5 that this picture is the same as that new computer  
6 picture there?

7 A. That wasn't your question. Your question was  
8 remotely like. And what I said before you asked your  
9 question was that the center green line is right out of  
10 Figure 8. The connection -- the green connection  
11 between the southbridge and the northbridge is what  
12 Figure 8 depicts.

13 Q. Okay. Well, let's look at this. This is Dr.  
14 Chu's drawing, which isn't in the patent, and this is  
15 the northbridge and the southbridge, right?

16 A. Yes.

17 Q. Yes?

18 A. That's right.

19 Q. And he puts it all in this box here, correct?

20 A. Yes.

21 Q. Okay. Well, let's look at Figure 8.

22 There's the northbridge, right, up here in the  
23 top?

24 A. Yes.

25 Q. And that says computing system, and it has a

1 box around it, right?

2 A. Yes.

3 Q. And then there's a separate box called  
4 peripheral system.

5 Do you see that?

6 A. That's right.

7 Q. And the squiggly line goes between the  
8 computing system and the peripheral system, doesn't it,  
9 sir?

10 A. That's right.

11 Q. That's different than what Dr. Chu says his  
12 invention is here, isn't it, sir?

13 A. No, not at all.

14 Q. In this picture, there's two boxes, and the  
15 squiggly line goes between those two boxes, between a  
16 computer and a peripheral component, right?

17 A. In this case, a peripheral system that's  
18 tightly integrated to the computer system, yes.

19 Q. Now, you also testified when you were talking  
20 about Figure 8 as part of your testimony, you addressed  
21 this little line here between the CPU and the  
22 northbridge.

23 Do you see that?

24 A. I do.

25 Q. Isn't it true, sir, that that line there is an

1 old-fashioned parallel PCI bus?

2 A. Between the CPU and the northbridge?

3 Q. Yeah.

4 A. Absolutely not.

5 Q. Well, I'd like you to look at your deposition  
6 from --

7 MR. VERHOEVEN: Just a second, and I'll  
8 get you the date. November 17th. If we could bring up  
9 Page 203, Ryan.

10 And if we could pull up towards the  
11 bottom this answer here, beginning at Line 15 through  
12 21.

13 Q. (By Mr. Verhoeven) You refer here to: In  
14 those days, a very wide, very fast parallel bus that  
15 connects the CPU address and data lines between several  
16 other command and management lines between the CPU and  
17 the northbridge.

18 Do you see that?

19 A. Yes. Let me recall what I was thinking of.

20 Q. That's a parallel bus, right?

21 A. Excuse me? I'm sorry?

22 Q. That's a parallel bus you're referring to.

23 A. Let me finish reading the citation back there  
24 and refresh my recollection about what I had in mind,  
25 which I still can't tell you about, but I can describe

1 it.

2 MR. BROGAN: What page?

3 MR. VERHOEVEN: Page 403.

4 A. Yes. Okay. I have it in mind.

5 MR. VERHOEVEN: Okay. Let's go back to  
6 Figure 8. Can I have Figure 8, please?

7 Q. (By Mr. Verhoeven) That's this line right here  
8 between the CPU and the northbridge, right?

9 A. I'll mark it for you. And the answer is --  
10 that is the kind of connection I was talking about in my  
11 deposition is reflected in this line here (indicates).

12 MR. VERHOEVEN: Now, if we could put up  
13 Claim 12 on the board.

14 If I may approach, Your Honor?

15 THE COURT: Okay.

16 MR. VERHOEVEN: Do I need to unscrew  
17 this? Well, we need to make sure the jury can see it.

18 Q. (By Mr. Verhoeven) Can you see that, sir?

19 A. I can.

20 MR. VERHOEVEN: Can everyone see that?  
21 Okay.

22 Q. (By Mr. Verhoeven) So this, again, is  
23 Claim 12.

24 Now, you testified on direct examination about  
25 the northbridge, and I want you to tell me -- tell the

1 jury, where does the word northbridge appear in this  
2 claim.

3 A. It does not.

4 Q. Where does the word southbridge appear in this  
5 claim?

6 A. It's not there.

7 Q. These claims aren't limited to specific  
8 functionality on the northbridge or the southbridge, are  
9 they, sir?

10 A. They're limited, as the Court has construed  
11 them, to a very high level of integration between  
12 whatever talks over the peripheral component in a net --  
13 interconnect.

14 Q. So the answer to my question, these claims  
15 here that we're looking at, they don't have the words  
16 northbridge or southbridge in them, right?

17 A. That's right.

18 Q. And they're not limited to a northbridge or a  
19 southbridge, are they, sir?

20 A. No.

21 Q. Now, you remember giving a deposition in this  
22 case, right?

23 A. Yes.

24 Q. And you were asked at your deposition whether  
25 any other court had ever criticized any of your

1 opinions.

2 Do you remember that, sir?

3 A. Yes, I do remember that.

4 Q. And you testified that that had only happened  
5 on one occasion, the Default Proof Credit Card System  
6 versus Home Depot case.

7 A. One case, two courts.

8 Q. Okay. But in truth, sir, isn't it true that  
9 your opinions have been criticized on numerous other  
10 occasions?

11 A. Not that I'm aware of.

12 Q. You don't remember, in 1999, that District  
13 Judge Feikens of the Eastern District of Michigan  
14 rejected your opinions because they were conclusory and  
15 unreliable?

16 A. I believe that's the ++Quervo case, isn't it?

17 Q. I'm sorry?

18 A. I don't know which case you're talking about,  
19 but I -- it sounds like the conclusory complaint that  
20 the Court made sounds like the Quervo case.

21 Q. Have you heard of the Relume Court versus  
22 Dialight court case?

23 A. Relume, yes. That's a different matter.

24 Q. That's a different matter.

25 A. Yes, it is.

1 Q. And in that case, the Court said that it  
2 rejected your opinion because your assessment was  
3 conclusory and was without reliable factual foundation.

4 Do you remember that?

5 A. I do remember that.

6 Q. Okay. You forgot that at your deposition?

7 A. I had.

8 Q. The Court said: Gafford's opinion on this  
9 issue is not significantly probative, right?

10 A. That sounds familiar.

11 Q. Okay. But that's not it -- all. Do you  
12 remember Judge Arterton in 2002 in Connecticut from the  
13 Sony Electronics versus Soundview Technologies case?

14 A. I'm aware of the case.

15 Q. You were retained as an expert in that case,  
16 too, weren't you?

17 A. Yes.

18 Q. And did you -- do you remember that Judge  
19 Arterton found that your opinion was based on a flawed  
20 definitional premise?

21 A. That sounds familiar.

22 Q. Do you remember that the Court said: Because  
23 they are based on a broad definitional premise, the  
24 Gafford and Snell declarations are insufficient to rebut  
25 the factual content of the other declarants.

1 Do you remember that, sir?

2 A. I do.

3 Q. Okay. And in the Default Proof case, the one  
4 that you remembered in your deposition, District Judge  
5 Altonaga also found your opinions to be without  
6 sufficient evidentiary foundation, didn't he?

7 A. Yes, he did.

8 Q. He said: Mr. Gafford offers no evidence to  
9 show that one of ordinary skill, at the time of the  
10 patent application, would have considered either of  
11 these devices to be capable of defending, or as Default  
12 Proof argues, handing over a debit card.

13 Do you remember that opinion?

14 A. Yes.

15 Q. And Judge Altonaga found that your opinions  
16 and statements were contradicted by the intrinsic  
17 record, correct?

18 A. Yes.

19 Q. And that went up on appeal, correct?

20 A. It did.

21 Q. And the Federal Circuit appellate court agreed  
22 with Judge Altonaga, right?

23 A. Yes.

24 Q. That your opinions were either unsupported or  
25 contradicted by the express language of the written

1 description in that patent in that case, right?

2 A. Yes.

3 Q. And, in fact, there's another Federal Circuit  
4 case, the Octel Corp. versus Theis Research case.

5 Do you remember that case?

6 A. Yes.

7 Q. And in that case, the Federal Circuit Appeal  
8 Court ruled that the trial court was absolutely correct  
9 in dismissing your testimony in that case, because your  
10 testimony was premised on an unduly broad  
11 interpretation.

12 Do you remember that?

13 A. Yes.

14 Q. And the Federal Circuit Appeal Court in that  
15 case, the Octel case, found your testimony provided to  
16 the jury -- quote, the jury with an incorrect yardstick  
17 with which to measure the prior art.

18 Do you remember that, sir?

19 A. Yes.

20 MR. VERHOEVEN: I think I'll pass the  
21 witness at this time, Your Honor.

22 THE COURT: All right. Recross -- or  
23 redirect?

24 REDIRECT EXAMINATION

25 BY MR. BROGAN:

1 Q. Mr. Gafford, to the extent that you've been  
2 criticized by other courts, have you learned from those  
3 mistakes?

4 A. Absolutely.

5 Q. In this case, when we were talking about the  
6 construction of the term PCI bus transaction, was it  
7 IBM's possession -- position that the only way you could  
8 have one of those transactions was to have an old  
9 parallel PCI bus present?

10 A. Yes, that was the position IBM took.

11 Q. And what did the Court do with that?

12 A. It threw it out.

13 Q. Do you call that a form of criticism?

14 A. Yes.

15 Q. Is it common when experts are in cases like  
16 this for the experts to propose constructions and have  
17 the courts adopt one, adopt the other, or adopt  
18 something else?

19 A. That is what always happens.

20 Q. Counsel showed you -- or talked about ethernet  
21 and USB. Ethernet or USB have those PCI data bits we  
22 were talking about earlier?

23 A. Address bits.

24 Q. The address bits?

25 A. No. No.

1 Q. Do they have PCI bus transactions as defined  
2 by the claims?

3 A. No.

4 Q. Does Figure 8 of the Chu patent teach that you  
5 can have a serialized PCI interface between a  
6 northbridge and southbridge?

7 A. Yes.

8 Q. Has that been found in any of the prior art  
9 that's been presented by IBM?

10 A. No. No internal serialized PCI bus between  
11 anything and anything else in any of the prior art.

12 Q. Now, does Dr. Chu have in his claims -- or  
13 not --

14 MR. BROGAN: Strike that.

15 Q. (By Mr. Brogan) Does Dr. Chu have in his  
16 patent, for instance, Figure 1, any described system  
17 that doesn't have serialized PCI in it at all?

18 A. I've honest to God forgotten what Figure 1 has  
19 in it.

20 MR. BROGAN: Can you put up Figure 1 of  
21 the '415?

22 How about Figure 2?

23 Q. (By Mr. Brogan) In Figure 2, do you see  
24 serialized PCI anywhere?

25 A. Could you blow this up a little?

1 Q. Sure.

2 MR. BROGAN: Can you blow it up and bring  
3 it up?

4 Q. (By Mr. Brogan) Do you see serialized PCI in  
5 Figure 2?

6 A. No, it's not there.

7 Q. It's got the old PCI bus?

8 A. That's right.

9 Q. Okay. Dr. Chu could have written claims to  
10 cover that as well, right?

11 A. He could have.

12 Q. But in this case, he wrote claims that covered  
13 the use of a serialized PCI bus, right?

14 A. That's right.

15 Q. And in this claim limitation and in thinking  
16 about Figure 8, does this interface controller exist in  
17 that northbridge circuit?

18 A. Yes.

19 Q. And do each of the accused products in this  
20 case have a PCI Express interface on their northbridge  
21 circuit?

22 MR. VERHOEVEN: Objection, Your Honor.

23 May I approach?

24 THE COURT: Yes, you may.

25 (Bench conference.)

1 MR. VERHOEVEN: Your Honor, the question  
2 was: Do each of the accused products in this case have  
3 the element he's pointing at? That's infringement.  
4 That's not a proper rebuttal on validity, Your Honor.

5 MR. BROGAN: My next question is going to  
6 be: And do any of the prior art products identified by  
7 them have that?

8 MR. VERHOEVEN: That's a different  
9 question. I mean, this is invalidity rebuttal.

10 THE COURT: Why don't you ask that  
11 question.

12 MR. BROGAN: Okay.

13 (Bench conference concluded.)

14 Q. (By Mr. Brogan) Dr. Gafford, do any of the  
15 prior art products that have been identified here have a  
16 northbridge with a serialized PCI interface?

17 A. No.

18 MR. BROGAN: I'll pass the witness, Your  
19 Honor.

20 THE COURT: All right. Any recross?

21 MR. VERHOEVEN: No recross, Your Honor.

22 THE COURT: Okay. Very well.

23 Who will Plaintiff's next witness be?

24 MR. BROGAN: Let me confer quickly.

25 (Sotto voce discussion.)

1 MR. BROGAN: That's it, Your Honor. Good  
2 news for the jury.

3 THE COURT: Okay. Plaintiff rests?

4 MR. BROGAN: Yes, Your Honor.

5 THE COURT: All right. Then Defendant  
6 finally closes?

7 MR. VERHOEVEN: Yes, Your Honor.

8 THE COURT: All right. Very well.

9 All right, Ladies and Gentlemen of the  
10 Jury, we have now completed the evidence phase of the  
11 case. That's all the evidence that you're going to need  
12 to hear in this case.

13 And good news for you. You're going  
14 to -- getting to go home a little bit early today. I  
15 have some work I have to do with the attorneys on the  
16 Court's Charge. We'll work on that this afternoon.

17 Then we'll come back in the morning at  
18 9:00 o'clock. I will give you the Court's Charge, the  
19 final instructions. Then we'll hear closing arguments  
20 from Counsel. And then you'll retire to begin your  
21 deliberations on the verdict.

22 Please remember my instructions again  
23 tonight. Do not discuss this case among yourselves or  
24 with anyone else. The first time that you'll discuss  
25 the case will be when you begin deliberating tomorrow.

1                   Also, don't do any independent  
2     investigation of any type, as I've told you previously.

3                   With the Court's thanks for your  
4     attention today and your presence, we'll see you back  
5     here at 9:00 o'clock in the morning. Please have a safe  
6     drive home.

7                   The jury is excused.

8                   COURT SECURITY OFFICER: All rise for the  
9     jury.

10                  (Jury out.)

11                  THE COURT: Please be seated.

12                  All right. Does Plaintiff have any  
13     objections to the Court's Charge?

14                  MR. FRIEL: Your Honor, we haven't seen  
15     the Charge.

16                  LAW CLERK: I gave both parties a copy.

17                  MR. VERHOEVEN: Well, we have a copy. I  
18     thought you gave it to the other side.

19                  LAW CLERK: I did.

20                  MR. VERHOEVEN: Oh, okay. We have a  
21     copy.

22                  THE COURT: I think you have a copy. One  
23     was handed out to both sides when we came back after  
24     lunch.

25                  MR. FRIEL: Your Honor, I didn't realize

1     that -- I thought you said we would have a couple of  
2     hours this afternoon after the jury --

3                 THE COURT: Well, you've had it since --  
4     I gave to it you right after lunch.

5                 MR. FRIEL: Sorry.

6                 THE COURT: That's why I indicated you  
7     needed to get your legal people looking at it in case  
8     you had any objections.

9                 MR. FRIEL: If I could confer for a  
10    moment.

11                THE COURT: Okay. And if y'all would  
12    like, I'll give you a 10-minute recess. Would that be  
13    helpful to you?

14                MR. FRIEL: That would be very helpful.

15                THE COURT: Okay. We'll have a 10-minute  
16    recess.

17                COURT SECURITY OFFICER: All rise.

18                (Recess.)

19                (Jury out.)

20                THE COURT: Be seated.

21                Let me say this about the charge. There  
22    may be some items in there that need to come out that I  
23    don't recall hearing any evidence about, but the  
24    Defendant wasn't through with their case at the time, so  
25    they're in there, so we can deal with those when we get

1 to them.

2 All right. Plaintiff's objections to the  
3 Court's Charge?

4 MR. FRIEL: Ten minutes, Your Honor, has  
5 convinced me that Ms. Guske is the one to handle it.

6 THE COURT: Probably a good choice.  
7 You've been busy.

8 MR. FRIEL: Mr. Smith will handle the  
9 interrogatories to the jury, special interrogatories.

10 THE COURT: Oh, okay. All right.

11 MR. SMITH: Your Honor, while Ms. Guske  
12 gets set up back here, we only have two requests with  
13 respect to the verdict form.

14 The first is, we would like to have a  
15 separate column for anticipation and invalidity. So we  
16 would go from one column to three, with the first being  
17 infringement, the second being anticipation, and the  
18 third being obviousness.

19 THE COURT: And what is Defendant's  
20 response to that? He requests --

21 MR. STONE: I don't think there's any  
22 reason to deviate from the standard form, Your Honor.

23 THE COURT: Okay.

24 MR. SMITH: Your Honor, the standard form  
25 I'm looking at is the form that this Court -- and I'm

1     trying the get the overhead going here -- but in the  
2     Forgent case, Your Honor submitted invalidity there with  
3     three columns: A, lack of adequate written description;  
4     B, anticipation; and C, obviousness.

5             And since there are different prior art,  
6     we think it would be clearer if the jury had an  
7     anticipation question and then an obviousness question.

8             THE COURT: Okay. I'll take that under  
9     advisement. I've submitted it every which way.

10            MR. SMITH: And, Your Honor, the specific  
11     form I'm looking at should be on the overhead here, if I  
12     can get it to pull up. It is docket entry 853 in the  
13     Forgent case, 6:06-CV-20.

14            As it should reflect there, there are  
15     three columns for the three different invalidity  
16     defenses in that case.

17            THE COURT: Okay. I'll take a look at  
18     it. If I do that, I may go to one question and just the  
19     infringement, then a separate question with the two  
20     invalidity columns underneath it. It may get a little  
21     crowded there to try to do all three, but we'll look at  
22     it.

23            MR. SMITH: Thank you, Your Honor.

24            The only other request that we would have  
25     on the form is under Question 3. In order to make the

1 question for past infringement, we would propose  
2 inserting the word "past" between the two words "IBM's"  
3 and "infringement" on the second line. So that the  
4 first sentence would read: What sum of money, if paid  
5 now in cash, do you find from a preponderance of the  
6 evidence would fairly and reasonably compensate ACQIS  
7 for IBM's past infringement?

8 THE COURT: Any objection to that?

9 MR. STONE: So where exactly would you  
10 add the word, Counsel?

11 MR. SMITH: At the end of the first  
12 sentence, before the word "infringement," so the first  
13 sentence would end "for IBM's past infringement."

14 MS. CANDIDO: Your Honor, by definition,  
15 there is only past infringement, so I think that's  
16 redundant and unnecessarily confusing for the jury.

17 THE COURT: Okay. All right. The Court  
18 will grant the request. I don't think -- I think it  
19 might be clearer.

20 MR. STONE: Your Honor, if I may, are  
21 there any other comments on the --

22 MR. SMITH: That's all we had on the  
23 verdict form.

24 THE COURT: Do the Defendants have  
25 anything on the verdict form?

1 MR. STONE: We're looking at Claims 11,  
2 73, and 56 were dropped, so I take it -- we talked about  
3 agreeing to drop those claims that are extraneous from  
4 both the instructions and from the verdict form.

5 MS. GUSKE: Correct.

6 THE COURT: 11 and 73 of the '415 --

7 MR. STONE: Correct.

8 THE COURT: -- and 56 of the '779 are  
9 dropped; is that correct?

10 MR. STONE: That's correct, Your Honor.

11 THE COURT: Is that correct, Mr. Smith?

12 MR. SMITH: Yes, Your Honor.

13 THE COURT: All right. We'll take those  
14 out, and we'll take out -- we'll change it where it's  
15 referenced. I believe it's in the contentions section  
16 of the charge. We'll change that reference, as well,  
17 back.

18 Anything else on the verdict form from  
19 either side?

20 MR. SMITH: Not from the Plaintiff.

21 MR. STONE: Not from the Defendant.

22 THE COURT: All right. Let's go through  
23 the charge. Does Plaintiff have any objections to the  
24 Court's Charge?

25 MS. GUSKE: Yes, we do, Your Honor.

1 Just based on what we were just talking about, do you  
2 mind if I just go through in order? Is that --

3 THE COURT: No, that's fine. Just tell  
4 me what page and paragraph you are referencing.

5 MS. GUSKE: Sure. So starting with the  
6 contentions of the parties what we were just  
7 discussing -- is this even visible?

8 THE COURT: Which is on Page 5?

9 MS. GUSKE: Yes, Your Honor.

10 THE COURT: Okay. We'll take out 11.

11 MS. GUSKE: Right.

12 THE COURT: You've got something -- your  
13 book is over --

14 MS. GUSKE: Yeah, I think the book is  
15 over the lamp. Here we go.

16 THE COURT: Blow it up a little bigger,  
17 if you will.

18 We're taking out 11, 73, and 56, right?

19 MS. GUSKE: Correct. 56, to be clear, of  
20 the '779 patent.

21 THE COURT: Right. All right.

22 MS. GUSKE: Also, on that next paragraph  
23 on the same page, we're removing our request for a  
24 contributory infringement instruction.

25 THE COURT: Removing your request for

1     what?

2                   MS. GUSKE:   Contributory infringement.

3                   THE COURT:   Okay.   Where is that  
4     reference now?

5                   MS. GUSKE:   That's the very next  
6     paragraph.

7                   THE COURT:   Oh, the next paragraph.   All  
8     right.

9                   MS. GUSKE:   Skipping forward to Page 7,  
10    and this is the basically the lower quarter --

11                  THE COURT:   If Defendant objects to any  
12    of these things, please feel free to say so.

13                  MR. STONE:   Thank you, Your Honor.

14                  THE COURT:   I'll take it by your silence  
15    that you agree if you don't object.

16                  MR. STONE:   No.   With this, Your Honor,  
17    what I was going to ask with respect to the burden of  
18    proof is that we'd like to have the charge reflect the  
19    difference.

20                  THE COURT:   Well, she hasn't gotten to  
21    that yet.

22                  MR. STONE:   Okay.   Thank you.

23                  MS. GUSKE:   He's anticipating my  
24    argument.

25                         This particular sentence begins with

1 "evidence of prior art which was not reviewed by the  
2 PTO" and addresses whether it's more probative or not.  
3 ACQIS objects to that based on the current state of the  
4 law, but there is no distinction currently.

5 THE COURT: Do you have any law that says  
6 that instruction is improper?

7 It's not talking about the burden of  
8 proof.

9 MS. GUSKE: Not right now, Your Honor.

10 THE COURT: Well, what's Defendant's spin  
11 on that? You want your instruction about burden of  
12 proof, right?

13 MR. STONE: That's correct, Your Honor.

14 THE COURT: All right. Both objections  
15 are overruled.

16 MR. STONE: Thank you, Your Honor.

17 Just so we're clear, we're asking for the  
18 burden of proof to reflect the fact that it should be  
19 different if the art is considered by the offers and not  
20 considered by the offers.

21 THE COURT: All right.

22 MR. STONE: Thank you.

23 MS. GUSKE: So ACQIS' objection to this  
24 particular sentence is clear on the record, we object to  
25 the sentence that reads: Evidence of prior art which

1 was not reviewed by the PTO may be more probative of  
2 meeting the standard than prior art which was reviewed  
3 by the PTO.

4 THE COURT: Okay. Your objection is  
5 noted. Thank you.

6 MS. GUSKE: Next page, Your Honor, we  
7 would like to request an additional instruction on  
8 continuations and the importance of continuations in  
9 light of testimony that was provided during the course  
10 of the trial.

11 And in particular -- I don't have a  
12 printout right now, but I can read it into the record  
13 what we would request.

14 THE COURT: All right.

15 MS. GUSKE: And it would come right after  
16 Section 4.1.

17 Continuation is a patent application  
18 filed by an applicant who wants to pursue additional  
19 claims to an invention disclosed in a current  
20 application.

21 The continuation uses the same  
22 specification as the parent application. Claims the  
23 priority date of the parent and generally names at least  
24 one or the same inventor as the parent.

25 A continuation application is filed to

1 pursue the inventions that were disclosed by the parent  
2 application but not claimed in the parent -- parent  
3 patent. Thus, each claim in the parent application and  
4 each continuation application defines a unique invention  
5 and must be considered separately for your  
6 determinations of infringement, validity, and damages.

7 THE COURT: Okay. And what does that  
8 come out of?

9 MS. GUSKE: It's a summary or a  
10 paraphrasing of the law regarding what continuations are  
11 allowed to be claimed, and it clarifies the fact that --

12 THE COURT: Yeah, but -- I mean, is it  
13 coming out of any of the model patent jury instructions?

14 MS. GUSKE: No, Your Honor. It's based  
15 on case law.

16 THE COURT: Okay. Response?

17 MR. STONE: We would object to that, Your  
18 Honor. I believe that what they're proposing with  
19 respect to continuations actually completes  
20 continuations and continuations in part.

21 And we have a proposed jury instruction  
22 with respect to continuations that I would like to read  
23 into the record.

24 THE COURT: All right.

25 MR. STONE: Your Honor, if you see this

1 slide, it's a continuation is a patent issued from a  
2 second application for the same invention claimed in a  
3 prior non-provisional application and filed before the  
4 original prior application becomes abandoned or  
5 patented.

6 Parent and continuation patents are  
7 considered together, and the invention disclosed therein  
8 viewed as a singular whole. The disclosure presented in  
9 the continuation must be the same as that in the  
10 original application.

11 A continuation patent may not include  
12 anything that would constitute new matter and must rely  
13 on the same specification. A patent shares the same  
14 priority date as the related parent application.

15 And what we're relying on for support,  
16 Your Honor, is the provision from the MPEP regarding  
17 continuation applications, as well as two cases,  
18 application of DeFano 480 F.2d 892 and 893, and Truth  
19 Hardware Corp. versus Ashland Products.

20 THE COURT: Okay. Response?

21 MS. GUSKE: We -- the Plaintiff believes  
22 that the Defendant's proposed instruction is confusing  
23 and tries to conflate all of the individual claims into  
24 one claimed invention.

25 And I just pulled the case cites to

1 support Plaintiff's proposed instruction, if you'd like  
2 those.

3 THE COURT: All right.

4 MS. GUSKE: So the cases in particular  
5 are Combined Tactical System, Inc. versus Defense  
6 Technology Corp. of America, 589 F.Supp.2d 260,  
7 Pages 264 to 265, styled Southern District of New York  
8 in 2008.

9 And it cites Transco, which I'm sure this  
10 Court's familiar with, and also to Chisum.

11 THE COURT: Okay. What is -- what is  
12 Plaintiff's position with regard to if we just don't  
13 include any instructions on continuation applications?

14 Let me ask you: Did you request any  
15 instructions in your meet-and-confer with Defendants and  
16 in the charge that you proposed to us earlier?

17 MS. GUSKE: Previously today, I had a  
18 meet-and-confer with Defendants about continuation  
19 instructions, and it was at that time that it was  
20 brought up by both parties.

21 THE COURT: No. I mean, what you filed  
22 with the Court earlier that we've been working from, is  
23 this the first we've heard about this?

24 MS. GUSKE: This is the first you've  
25 heard about it, Your Honor.

1 THE COURT: All right. I'll take this  
2 under advisement, and it will either -- something will  
3 either be in there or it won't.

4 MS. GUSKE: Same page of the charge, 4.2,  
5 so this is Page 9.

6 THE COURT: Let me ask you, the both of  
7 you: The copies of your proposed instructions, if you  
8 would, reduce those to writing and leave them with my  
9 Law Clerk so that we'll have the benefit of having those  
10 in a tangible form, just a copy of your request to sign.

11 MR. STONE: Will do, Your Honor.

12 THE COURT: All right. What's next?

13 MS. GUSKE: Same page, Page 9, the  
14 previous paragraph, so it's Charge 4.2 in the Court's  
15 proposed charge.

16 ACQIS would request clarification that  
17 the same construction should be applied for both  
18 infringement and validity. And previously, the parties  
19 had agreed on including that sentence in this portion of  
20 the charge. It just didn't make it into Your Honor's  
21 charge.

22 THE COURT: Okay. Tell me specifically  
23 what you're asking me to put where.

24 MS. GUSKE: Sorry. This is chicken  
25 scratch, I'm sure.

1                   Following the sentence: You must accept  
2 the meanings I give you and use those meanings when  
3 you --

4                   THE COURT: I'm sorry. I can't hear you.  
5 If you could slow down, please.

6                   MS. GUSKE: Sure. So immediately  
7 following the sentence of: You must accept the meanings  
8 I give you and use those meanings when you decide  
9 whether or not the patent claims are infringed and  
10 whether or not they are invalid.

11                  THE COURT: All right.

12                  MS. GUSKE: ACQIS would propose the  
13 sentence be added: The instructions must be the same --  
14 applied the same for both infringement and validity.

15                  THE COURT: The what must be?

16                  MS. GUSKE: The constructions.  
17 Or if you prefer: The definitions of the claim terms  
18 must be applied the same as -- for invalidity as for  
19 infringement.

20                  THE COURT: Okay. Quote for me as in  
21 quote marks you want inserted after the word "invalid"  
22 the following sentence. Quote, slowly.

23                  MS. GUSKE: The claim constructions must  
24 be applied the same for infringement as invalidity.

25                  THE COURT: Okay. Any objection from

1 Defendant with regard to that?

2 MR. STONE: I think Your Honor's sentence  
3 already suggests that, the previous sentence, saying  
4 accept the meanings for both invalidity and with respect  
5 to infringement. So it seems surplusage.

6 THE COURT: The Court agrees. That  
7 request is denied.

8 What's next?

9 MS. GUSKE: Page 9, Your Honor, ACQIS  
10 would request a new instruction addressing the claim  
11 constructions not taken up during trial for this case.  
12 I can provide you with the language that we would  
13 propose.

14 THE COURT: Tell me what you're  
15 requesting. You're asking for another paragraph?

16 MS. GUSKE: Yes, Your Honor.

17 THE COURT: That says what? See, I can't  
18 read your handwriting very well on the slide you have up  
19 there.

20 MS. GUSKE: It's small.

21 So what we would request is an  
22 instruction entitled meaning of plurality operates a PCI  
23 bus transaction, and the instruction would read: As  
24 used in the asserted claims, plurality means two or  
25 more --

1 THE COURT: Now, won't that be included  
2 in the claim -- isn't it included in the claim charge at  
3 the end of the charge?

4 MS. GUSKE: No, it's not, Your Honor.  
5 This was -- these were the terms that we had -- the  
6 parties have briefed midweek last week.

7 THE COURT: We will add them to -- now,  
8 these are the ones I've already ruled on.

9 MS. GUSKE: These are the ones you  
10 declined to rule on.

11 MR. STONE: And given that, Your Honor, I  
12 don't see why we'd be arguing claim construction at this  
13 stage of the case.

14 THE COURT: So what --

15 MR. SMITH: Your Honor, to preserve the  
16 point, we would like to ask -- formally ask the Court to  
17 include the two additional constructions that we  
18 previously asked for and the Court denied.

19 THE COURT: Well -- yeah. I deny them  
20 again.

21 MR. SMITH: Thank you, Your Honor.

22 MS. GUSKE: Can I clarify for the record  
23 the constructions or the terms we would like construed?

24 THE COURT: Yes, you may.

25 MS. GUSKE: We would like constructions

1 of the terms plurality as used in the claims, operates  
2 as used in the asserted claims, and clarification on the  
3 Court's construction of PCI bus transaction.

4 THE COURT: Okay. What are you asking me  
5 to do?

6 MS. GUSKE: Would you like the proposed  
7 instructions, Your Honor?

8 THE COURT: Well, are these that were  
9 already in briefing and I already overruled your  
10 position?

11 MS. GUSKE: Yes.

12 THE COURT: All right. I'm overruling  
13 your position again. Let's move on to something else.

14 MS. GUSKE: Okay. Next page, this is  
15 a -- the Court's Charge relating to independent and  
16 dependent claims.

17 THE COURT: What page are you on?

18 MS. GUSKE: Pardon?

19 THE COURT: What page are you on?

20 MS. GUSKE: I'm on Page 10.

21 THE COURT: Page 10, all right. Okay.

22 MS. GUSKE: And no objections to the  
23 language that's in this charge; however, it was moved  
24 from relating specifically to the infringement charge to  
25 a more general charge. So we would request at the end

1 of the second-to-last paragraph on Page 10, a parallel  
2 sentence be added relating to what must be proven to  
3 show invalidity for a dependent claim.

4 THE COURT: Response?

5 MR. STONE: My response, Your Honor, is  
6 that these paragraphs refer to your instructions  
7 concerning infringement, and to add that at the end  
8 would seem to invite confusion.

9 MS. GUSKE: My response to that would be  
10 that they no longer apply just to infringement based on  
11 their position within the charge currently.

12 THE COURT: And you want to repeat the  
13 paragraph subsetting the word to find invalidity for  
14 infringement?

15 MS. GUSKE: Correct. The current charge  
16 addresses what is required to show infringement. We  
17 would want to repeat that or include a sentence that  
18 says it's the same standard for demonstrating invalidity  
19 of a dependent claim.

20 THE COURT: Okay. Dictate the sentence  
21 that you would like to have included.

22 MS. GUSKE: There will be several  
23 sentences.

24 In order to find invalidity of Dependent  
25 Claims 12 and 74 of the '415 patent, you must first

1 determine -- you must first determine whether  
2 Independent Claims 11 and 73, respectively, of the '415  
3 patent are invalid.

4 In order to find invalidity of Dependent  
5 Claim 57 of the '779 patent, you must first determine  
6 whether Independent Claim 56 of the '779 patent is  
7 invalid.

8 If you decide that the independent claim  
9 has not been proven to be invalid, then the dependent  
10 claim cannot be found to have been invalid.

11 If you decide that the independent claim  
12 has been shown to be invalid, then you must separately  
13 determine whether each additional requirement of the  
14 dependent claim has also been shown in the prior art.

15 If each additional requirement has been  
16 proven, then the dependent claim has been shown invalid.

17 THE COURT: All right. I will take a  
18 look at that.

19 MS. CANDIDO: Your Honor, if I may  
20 address that for one moment?

21 THE COURT: Yes.

22 MS. CANDIDO: IBM objects to that. I was  
23 only taking it in by hearing it; but one of the issues  
24 is that seems to suggest that if the jury were to find  
25 an independent claim, the independent aspect of it to be

1 valid, then they have to stop, which is not true, of  
2 course, because if the missing element is the element in  
3 the dependent claim, then the independent claim would be  
4 invalid.

5 So I think that's actually not an  
6 accurate statement of what the jury is charged with. So  
7 we would object to that proposed instruction, Your  
8 Honor.

9 THE COURT: All right. What's next?

10 MR. STONE: Your Honor, with respect to  
11 this paragraph, there's also reference to a patent that  
12 has been dropped, patent claims.

13 THE COURT: Okay. Which ones need to be  
14 excluded?

15 (Sotto voce discussion between parties.)

16 MR. STONE: We're okay. Thank you, Your  
17 Honor.

18 MS. GUSKE: Okay. Turning to Page 11,  
19 the Section 5.3, indirect infringement, in light of  
20 ACQIS withdrawing its request for contributory  
21 infringement, this paragraph needs to be amended.

22 MR. SMITH: Your Honor, the specific  
23 amendment would be to add the words at the end of the  
24 first sentence, quote, by inducing infringement by  
25 another, period. Then delete the next sentence which

1 carries over to the top of the next page. Delete the  
2 sentence beginning, the act of encouraging. And delete  
3 the final sentence of this section.

4 THE COURT: All right. That's granted.  
5 We will make that change.

6 What's next?

7 MS. GUSKE: Same -- or moving on to the  
8 inducement instruction itself, in particular the last  
9 sentence of that instruction on Page 13, it reads:  
10 Finally, ACQIS must prove that there is direct  
11 infringement for each instance of indirect infringement.

12 ACQIS maintains its objection to the  
13 inclusion of this sentence as it's redundant.

14 THE COURT: All right. That's overruled.

15 MS. GUSKE: So it's the last sentence of  
16 that paragraph, which I just read, that begins with,  
17 finally ACQIS must prove that there is direct  
18 infringement for each instance of indirect infringement,  
19 we would like our objection noted.

20 THE COURT: It's noted.

21 MS. GUSKE: Defense Counsel has confirmed  
22 that it's dropping all 112 related defenses, so starting  
23 on Page 14, Section 6.2 through -- through 6.3 that  
24 begins on Page 15, we ask those instructions be stricken  
25 in their entirety.

1 THE COURT: Is that correct, Counsel?

2 MR. STONE: That's correct.

3 THE COURT: All right. 6.2 and 6.3 will  
4 be taken out.

5 MS. GUSKE: All right. Moving on to  
6 anticipation instructions, 6.4 on Page 17, ACQIS  
7 requests clarification that this instruction and IBM's  
8 anticipation theories are limited to the Ketris art per  
9 its agreement. This came up earlier today.

10 In particular, two -- two clarifications  
11 based on an error that was made in the court record  
12 by -- I think inadvertently by Mr. Verhoeven.

13 One, we would like -- at the end of the  
14 first sentence of this section to -- the full sentence  
15 would read: IBM contends that the asserted claims are  
16 invalid, because the claimed invention is not new based  
17 on the Ketris prior art.

18 And then at the end of that instruction  
19 on the next page, on Page 18, we would request that the  
20 following statement be read to the jury as a corrective  
21 measure:

22 You may only consider the Ketris prior  
23 art in making your decision regarding the alleged  
24 anticipation of the asserted claims.

25 You are instructed to disregard any

1 testimony and evidence relating to the alleged  
2 anticipation by any other prior art.

3 THE COURT: Okay. Response?

4 MR. STONE: So, Your Honor, I don't think  
5 this is a jury instruction issue. I believe that the  
6 model and what the Court has proposed should be adopted,  
7 and it should control.

8 The evidence is now in. During their  
9 rebuttal, they were making arguments about art that  
10 anticipated or did not, art that was obvious or was not.  
11 And if we permit -- if we permit lawyer argument as part  
12 of these instructions, I think it's going to lead to  
13 jury confusion. That's not the proper place for it.  
14 The evidence is now in concerning various invalidity  
15 theories.

16 THE COURT: Are you objecting to their  
17 first request at the beginning of the section --

18 MR. STONE: I am, Your Honor.

19 THE COURT: -- that says based on the  
20 Ketris prior art?

21 MR. STONE: Yes, I am, Your Honor.

22 THE COURT: Are you claiming that you're  
23 entitled for the jury to consider anything other than  
24 the Ketris prior art with regard to your anticipation  
25 defense?

1 MR. STONE: I believe they can now, Your  
2 Honor, based on the evidence that's been provided to  
3 them and the arguments that Counsel for ACQIS has made.

4 THE COURT: Response?

5 MS. GUSKE: My response is that Your  
6 Honor was very clear this morning that the Defendants  
7 were confined to the agreement that they had made with  
8 respect to any 102 arguments; and our concern is that if  
9 there isn't some sort of corrective instruction on the  
10 record, it actually will be more confusing for the jury,  
11 since I believe Mr. Verhoeven elicited testimony from  
12 IBM's expert, Dr. McClure, this morning regarding an  
13 opinion of anticipation based on the RLX art, which is  
14 outside of the agreement and Your Honor's instruction.

15 THE COURT: I will -- I will grant your  
16 request as to inserting the word -- after the first  
17 sentence of the 6.4 instruction, adding the clause:  
18 Based on the Ketris prior art.

19 In all other respects, your request is  
20 denied.

21 MS. GUSKE: Thank you, Your Honor.

22 THE COURT: All right. What's next?

23 MR. STONE: And, Your Honor, just  
24 briefly.

25 They did make the argument in connection

1 with Mr. Gafford's rebuttal that Ketris and RLX and  
2 QuantumNet did not anticipate based on Mr. Gafford's  
3 analysis. And so I think that by doing this, it does  
4 lead to the possibility of the jury being confused.

5 THE COURT: Okay. Thank you.

6 All right. What's next, Counsel?

7 MS. GUSKE: This will look familiar as it  
8 relates to the next anticipation instruction on Page 19,  
9 Instruction 6.5. We request that a similar statement be  
10 added at the end of the first sentence confining  
11 anticipation to the Ketris prior art.

12 So what we request would be that the full  
13 first sentence reads: IBM contends that each of the  
14 asserted claims of the patents-in-suit are invalid as  
15 anticipated, because the invention was first made or  
16 invented by someone else, hyphen, namely, the Ketris  
17 prior art.

18 THE COURT: You say mainly the Ketris --

19 MS. GUSKE: Namely.

20 THE COURT: Namely.

21 MS. GUSKE: Or specifically.

22 THE COURT: Response?

23 MR. STONE: We have the same objections  
24 to this, Your Honor.

25 THE COURT: All right. I'll grant the

1 request saying: Hyphen, specifically the Ketris prior  
2 art, period.

3 MS. GUSKE: Thank you.

4 THE COURT: Okay.

5 MS. GUSKE: Next is the same issue for  
6 the Instruction 6.6 on Page -- on Page 20.

7 I finally figured out how to use the  
8 overhead.

9 Similar issue here needs to be clarified  
10 to confine to Ketris. This is -- the opening paragraph  
11 here is structured a little differently, so what we are  
12 requesting is a modification to the -- the last or the  
13 third sentence of the first paragraph, so that it would  
14 read: For a patent claimed to be invalid because of a  
15 statutory bar, all of its requirements must have been  
16 present in one of the prior art references, in this  
17 case, Ketris, dated more than one year before the  
18 effective filing date of the patent application.

19 THE COURT: Okay. Response? Same  
20 objection?

21 MR. STONE: I have the same objections,  
22 Your Honor, and I also believe that by adding it here,  
23 it's also misleading.

24 THE COURT: All right. The Court will  
25 insert the last sentence -- in the last sentence of the

1 6.6, anticipation statutory bars, first paragraph  
2 between reference and dated in this case, quote, in this  
3 case, comma, Ketris, comma, dated more than one year.

4 MS. GUSKE: Thank you.

5 THE COURT: All right. What's next?

6 MS. GUSKE: Next is Instruction 6.7 on  
7 Page 22, and this is a similar issue, although it's  
8 relating to the limited obviousness theories that IBM  
9 agreed to.

10 So we would request the first sentence in  
11 this instruction to read is: In this case, IBM contends  
12 that the asserted claims of the patents-in-suit are  
13 invalid as obvious based on Ketris, QuantumNet, RLX, and  
14 Hong and combination of them -- combinations of them.

15 THE COURT: Okay. Based on Ketris,  
16 Quantum --

17 MS. GUSKE: QuantumNet.

18 THE COURT: Okay. How do you spell that?

19 MS. GUSKE: Q-U-A-N-T-U-M and same word  
20 but capital N-E-T.

21 THE COURT: Comma, RLX, comma, and Hong,  
22 parentheses, in combinations --

23 MS. GUSKE: Of them.

24 THE COURT: Of them or combinations  
25 thereof.

1 MS. GUSKE: Thereof is fine.

2 THE COURT: Close parenthesis.

3 All right. Response?

4 MR. STONE: So, Your Honor, since this  
5 deals with the balance of the prior art that was  
6 presented to the jury, I don't think it's necessary to  
7 have any limiting instruction. And we go back to the  
8 objections that we had with regard to anticipation as  
9 well.

10 In addition, IBM did reserve the right to  
11 argue single preference obviousness as well, and so I  
12 think this leads to confusion. I don't think this is  
13 necessary to add anything to the jury.  
14 The rest of the parts are for obviousness.

15 THE COURT: All right. The Court will  
16 add the instruction as dictated by Plaintiff's Counsel.

17 MR. STONE: And, Your Honor, could we  
18 have a separate instruction to identify that single  
19 reference, obviousness is also available?

20 THE COURT: Response?

21 MS. GUSKE: I would consider any  
22 proposal, but I have not yet seen one.

23 MR. STONE: Well, I'm responding to what  
24 you just said.

25 So what I would propose, Your Honor, is

1     that a single reference can also form the basis for a  
2     finding of obviousness.

3             THE COURT:    Response?

4             MS. GUSKE:    Can I have that read back?

5             MR. STONE:    I can say it again.

6             THE COURT:    Say it again.

7             MR. STONE:    A single reference can also  
8     form the basis for a finding of obviousness.

9             MS. GUSKE:    I think facially that  
10    statement is fine, although IBM limited its single  
11    reference obviousness arguments to certain single  
12    references for the claims. I think it was actually the  
13    only single reference argument that they agreed to when  
14    limiting their theories with Ketris.

15            THE COURT:    All right. I will give the  
16    instruction as requested by Defense Counsel.

17            MS. GUSKE:    We reserve our -- any  
18    objections to the extent that it does bring in art  
19    outside of --

20            THE COURT:    I'm sorry. What?

21            MS. GUSKE:    I'm still -- to clarify, I'm  
22    a little concerned that now the jury is going to go back  
23    and consider single reference arguments that were not  
24    included by IBM when it limited its invalidity theories.

25            THE COURT:    Well --

1 MS. GUSKE: It should be limited to  
2 Ketris for single reference.

3 THE COURT: Do you agree with that,  
4 Counsel?

5 MR. STONE: No. We reserve our right  
6 with respect to single reference obviously in the  
7 communication.

8 THE COURT: All right. The Court's going  
9 to leave it as I just stated.

10 What's next?

11 MS. GUSKE: Moving forward to damages  
12 instructions starting on Page 33, based on testimony  
13 provided in this case, I would request an additional  
14 request for hypothetical negotiation and specifically  
15 the book of wisdom.

16 And I can read the proposed language.  
17 It would come right before Instruction  
18 7.5.

19 THE COURT: Before 7 -- okay. I can't  
20 see it on the overhead.

21 MS. GUSKE: Oh, I'm sorry. There's no --  
22 all I have is a place holder so --

23 THE COURT: You're requesting an  
24 instruction -- what's the caption?

25 MS. GUSKE: The caption would be damages,

1 evidence after the hypothetical negotiation, and the  
2 instruction would read: Evidence of things that  
3 happened after the date of hypothetical negotiation can  
4 and should be considered in evaluating the reasonable  
5 royalties.

6 THE COURT: Response?

7 MS. CANDIDO: Your Honor, IBM objects to  
8 that instruction. I don't think that's an accurate  
9 statement of the state of the law.

10 My understanding is that at a minimum you  
11 can only look prospectively forward if it was  
12 information that was known or could reasonably have been  
13 known at the time of the hypothetical negotiation. And  
14 that's not what that instruction would suggest.

15 THE COURT: All right. The Court is not  
16 going to give that instruction.

17 What's next?

18 MS. GUSKE: Same page, the Instruction  
19 7.6, government sales, there's been no evidence  
20 presented by IBM relating to its government sales  
21 defense in this trial.

22 THE COURT: Response?

23 MS. GUSKE: And we would ask that it be  
24 struck.

25 MS. CANDIDO: Your Honor, my

1 understanding is that the damages base that was  
2 presented does not include revenue from government  
3 sales. If that is inaccurate, then I might have an  
4 issue with that. But, obviously, if you're not accusing  
5 us, then it's not an issue.

6 MS. GUSKE: Let me confer, so I can  
7 clarify that.

8 THE COURT: All right.

9 (Sotto voce discussion.)

10 MS. GUSKE: We can agree to that, Your  
11 Honor.

12 THE COURT: You can agree to leaving it  
13 in?

14 MS. GUSKE: We can agree that there's no  
15 government sales in our space.

16 THE COURT: Okay. So --

17 MS. CANDIDO: In that case, Your Honor,  
18 we believe that there should be an instruction that  
19 government sales are not appropriate to include in the  
20 case.

21 THE COURT: All right. It may be late in  
22 the day, but y'all are talking past me. I'm not  
23 understanding what -- it sounds like you're about to  
24 agree; then it sounds like you're disagreeing.

25 So what's going on? Does -- Plaintiff

1 wants the instruction 7.6 taken out; is that correct?

2 MS. GUSKE: I'm sorry. Can you repeat  
3 your question?

4 THE COURT: All right. You need listen  
5 to me when I'm speaking.

6 MS. GUSKE: Yes, Your Honor.

7 THE COURT: Do I understand that  
8 Plaintiff wants 7.6 taken out of the charge?

9 MS. GUSKE: Yes.

10 THE COURT: Does Defendant agree to that?

11 MS. CANDIDO: No, Your Honor. We object  
12 to the basis that I've just been instructed that, in  
13 fact, the damages base does include sales to the United  
14 States Government upon which they're not entitled to  
15 recover.

16 THE COURT: Okay. But I don't recall any  
17 testimony by anybody attempting to raise that issue or  
18 segregate it out. I mean, how is this going to have any  
19 meaning to the jury? Did any witness opine about what  
20 the amount of those were or that they're in there?

21 MS. CANDIDO: I don't think that they  
22 did, Your Honor.

23 THE COURT: All right. We'll take out  
24 7.6 as requested.

25 What's next?

1 MS. GUSKE: Same page. I overlooked one,  
2 Your Honor. Page 33, instruction 7.5 relating to entire  
3 market value. In general, the language is fine, though  
4 it excludes the notion of a single functional unit.  
5 That's pretty clear from the case law. It was included  
6 in ACQIS's proposed instruction.

7 THE COURT: Okay. What proposed change  
8 do you recommend -- are you requesting be made to 7.5?

9 MS. GUSKE: We would prefer the  
10 instruction to read: Under the entire market value  
11 rule, a patent owner may recover damages based on the  
12 value of an entire apparatus or product containing  
13 several features, even though only one feature is  
14 patented, where the unpatented components function  
15 together with the patented components in some manner to  
16 produce a desired end product or result.

17 For the entire market value rule to  
18 apply, ACQIS must prove that the patented invention was  
19 the basis of customer demand for the product.

20 And that would replace the existing 7.5  
21 in its entirety.

22 THE COURT: Response?

23 MS. CANDIDO: Your Honor, we would  
24 strongly object to that instruction. As I have already  
25 addressed with the Court earlier, over the entire market

1 value rule, that there's a three-part test, for example,  
2 set out in Cornell -- in the Cornell case.

3 One of those prongs of the three-part  
4 test is the functional unit. The other one is the  
5 demand standard that's already in here, and there's a  
6 third.

7 So to carve out, you know, only one of  
8 them is improper. If anything, there should be all  
9 three prongs in there.

10 THE COURT: All right. Your request to  
11 modify 7.5 is denied.

12 What's next?

13 (Sotto voce discussion.)

14 MS. GUSKE: I'm sorry, Your Honor. Just  
15 to also preserve the record, we object to the inclusion  
16 of this instruction at all, because there's been  
17 absolutely zero evidence presented by Plaintiffs with  
18 respect to the entire market value rule.

19 There hasn't even been lip service paid  
20 to the concept that the patented features drive demand  
21 for the entire product, including the blade's unique  
22 options that are not even sold necessarily with blades  
23 and chassis.

24 THE COURT: All right. Your objection is  
25 overruled.

1                   What's next from the Plaintiff?

2                   MS. GUSKE: Nothing else from the  
3 Plaintiff, Your Honor.

4                   THE COURT: All right. What about the  
5 Defendant? Defendant have any objections?

6                   MS. CANDIDO: Your Honor, we're a bit of  
7 two minds, frankly, because with the changes that the  
8 Plaintiff has requested with respect to prior art and  
9 listing in detail all these different permutations,  
10 we're, frankly, inclined to say that the same should be  
11 true on infringement and that the instructions should  
12 specify that they have to carry the burden of proof with  
13 respect to each of the accused products and not treat  
14 them as a lump. Because they do bear that burden, so...

15                   However, you know, I'm of two minds  
16 because I think that complicating the jury instructions  
17 by elaborating on all of the prior art is not remedied  
18 by further complicating the jury instructions by adding  
19 in all these products.

20                   THE COURT: Well, I don't think the  
21 products, that there's the potential for confusion like  
22 there is with the prior art based upon the -- the status  
23 of the case, so...

24                   MS. CANDIDO: Perhaps -- I guess, what  
25 maybe we would request in one spot is just to list that

1 the asserted products are the following products, and  
2 they have to meet this burden with respect to each  
3 product.

4 THE COURT: Okay. Well -- okay. So what  
5 are you -- do you have a -- let's go to a line and page,  
6 and let's just go through it. Start at the front, and  
7 if you have an objection or a request, state it to me  
8 specifically.

9 MS. CANDIDO: On Page 11, Your Honor,  
10 this is the section -- the heading is Section 5 on  
11 infringement. The first reference that's made to  
12 IBM's -- IBM product is in the first paragraph under  
13 Section 5.2.

14 So we would propose perhaps either a  
15 parenthetical or a separate sentence that defines the  
16 term IBM product or IBM accused products and list the  
17 actual accused products individually.

18 THE COURT: And how many are there?

19 MS. CANDIDO: There's a total of six  
20 products, Your Honor.

21 THE COURT: What's Defendant's (sic)  
22 position with regard to that?

23 MS. GUSKE: Your Honor, in part of the  
24 horse trading that went on before trial, we negotiated  
25 representative products; and with respect to the

1 representative products, there are six, although the  
2 body of accused products that those cover -- I'm just a  
3 little confused what this instruction that they're  
4 proposing is trying to insinuate about the remaining  
5 blades that are represented by the six accused blades.

6 THE COURT: All right. I'm going to  
7 overrule that request or deny it.

8 What's next?

9 MS. CANDIDO: That's all the Defendant  
10 has, Your Honor.

11 THE COURT: Goodness gracious. I usually  
12 get all the objections from the Defendant and none from  
13 the Plaintiff, and y'all flip-flopped on me today.

14 All right. Very good.

15 Well, we'll-- we will get the charge in  
16 final shape. It will be available to you in the morning  
17 shortly before trial. And to the extent -- those that I  
18 took under advisement, your objections will be noted  
19 based on what you said on the record, and it will be  
20 obvious from whether I give an instruction or don't that  
21 I've granted it or denied it, okay?

22 MS. CANDIDO: Your Honor, there's just  
23 one point, if I may, that the parties wanted to clarify.

24 Mr. Stone had, I think, inadvertently  
25 said that the parties had agreed to file their JMOL

1     briefs by the close of evidence, and I think the  
2     standard is that they're filed prior to the case being  
3     given to the jury. And that's what the parties had  
4     intended.

5                 So I just -- we wanted to make sure that Your  
6     Honor was okay with that.

7                 THE COURT: Just file them under the  
8     rules, and you'll be fine.

9                 MS. CANDIDO: Great. Thank you very  
10    much.

11                THE COURT: All right. Now, with regard  
12    to willfulness, you have two minutes, if you would like  
13    to --

14                MR. BROGAN: All that, Your Honor.

15                THE COURT: -- pursue your willfulness  
16    case after the verdict comes in. It would be helpful to  
17    the Court to know whether you intend to do that or not.

18                MR. FRIEL: In the two quality minutes,  
19    Your Honor, the answer is no.

20                THE COURT: Okay. So --

21                Okay. All right. So we will not be  
22    having the second half of the submission or the second  
23    half of the bifurcated trial, if we get to that stage,  
24    right?

25                MR. FRIEL: Yes, Your Honor. Correct.

1 THE COURT: And that's agreeable with  
2 Plaintiff, of course --

3 MR. STONE: Yes, Your Honor.

4 THE COURT: I mean Defendant.

5 Okay. Very well. In light of that, we  
6 should get this to the jury by late morning or  
7 lunchtime.

8 Would the parties have any objection if  
9 Magistrate Judge Love were to sit on this case after it  
10 goes to the jury and receive the jury's verdict?

11 I have an Eastern District Judges Meeting  
12 and the interviewing of magistrate judges for the  
13 Beaumont Division tomorrow afternoon in Dallas that I  
14 need to be at.

15 MR. CHANDLER: Plaintiff has no  
16 objection.

17 MR. STONE: No objection, Your Honor.

18 THE COURT: All right. Very well.

19 Well, we'll plan to -- I'd love to stay  
20 here with you to see the outcome, but I'll hear about  
21 it, so...

22 MR. FRIEL: Your Honor, there's one small  
23 housekeeping matter, just to make sure. Closing, we  
24 would like to split -- Mr. Chandler would like to take  
25 part of the closing, and Mr. Stacy will take --

1 THE COURT: Okay. That's fine. Yeah,  
2 you can split it up however you'd like to.

3 MR. STONE: And then one last  
4 housekeeping matter. Can we confirm the time for the  
5 closing, whether it's 45 minutes or one hour?

6 THE COURT: What did I give you in the  
7 order? Do you remember?

8 MR. FRIEL: There's one here.

9 MR. STONE: My recollection was, Your  
10 Honor, it was 45 minutes.

11 THE COURT: Nicole, what was it? Do you  
12 remember?

13 Okay. Let us check the order.

14 MR. STONE: Thank you, Your Honor.

15 THE COURT: While she's checking on that,  
16 let me remind the parties to get your exhibits marked  
17 and ready for the jury in conformance with the Court's  
18 order.

19 And don't we have in that order now,  
20 Ms. Ferguson, for them to label them? So you'll need to  
21 exchange that.

22 COURTROOM DEPUTY: Yes, Your Honor.

23 THE COURT: Yeah. So the exhibits should  
24 be labeled as to what they are.

25 And I think we require an index now, too,

1 don't we?

2 COURTROOM DEPUTY: Yes, sir.

3 THE COURT: Yeah. Yeah. We had that in  
4 a case. The jury complained that we had all these  
5 exhibits, and we just dumped them all on them, and they  
6 couldn't find anything. So if you will please try to  
7 have that.

8 What did we find out the time? I may  
9 have it here. I recall it was 45 minutes, but I may be  
10 wrong.

11 MR. STONE: We were just looking at the  
12 transcript online, Your Honor, and it appears to be one  
13 hour. That's what you said in opening remarks.

14 THE COURT: I usually enter an order  
15 confirming that. Anybody found it yet?

16 MS. GUSKE: Yes, I have, Your Honor.  
17 It's Docket No. 592.

18 THE COURT: What did I say?

19 MS. GUSKE: You said one hour.

20 THE COURT: Okay. One hour it is then.  
21 All right. Well, we ought to get it to  
22 them by noon then, right at -- right about 12:00  
23 o'clock.

24 All right. I want to compliment both  
25 sides. It's been a long week, but both sides have done

1 a very professional job and gotten along well in the  
2 court, and I'm sure the jury appreciates that.

3 So be in recess till tomorrow.

4 COURT SECURITY OFFICER: All rise.

5 (Court adjourned.)  
6

7 CERTIFICATION  
8

9 I HEREBY CERTIFY that the foregoing is a  
10 true and correct transcript from the stenographic notes  
11 of the proceedings in the above-entitled matter to the  
12 best of our abilities.  
13

14 /s/\_\_\_\_\_

SHEA SLOAN, CSR

Date

15 Official Court Reporter

State of Texas No.: 3081

16 Expiration Date: 12/31/12  
17  
18

/s/\_\_\_\_\_

19 JUDITH WERLINGER, CSR

Date

Deputy Official Court Reporter

20 State of Texas No.: 731

Expiration Date 12/31/12  
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